UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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

DEFENDANT EDWARD L. MAGGIACOMO, JR.'S CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF HIS MOTIONS TO DISMISS AND REQUESTS FOR RECONSIDERATION

Defendant Edward L. Maggiacomo, Jr. ("Maggiacomo") submits this reply memorandum in further support of his Motions to Dismiss and Requests for Reconsideration in the above matters.

BRIEF OVERVIEW

On October 2, 2009, Plaintiff Transamerica Life Insurance Company ("Transamerica") filed a complaint against Joseph Caramadre, ("Caramadre"), Raymour Radhakrishnan ("Radhakrishnan"), Estate Planning Resources, Inc. ("Estate Planning Resources"), Estella Rodrigues ("Rodrigues"), Maggiacomo, Lifemark Securities Corp. ("Lifemark"), and Patrick Garvey ("Garvey"). This case is referred to as 09-471 (reflecting its civil action number). This complaint was amended on October 16, 2009. In addition, Transamerica filed a complaint against Lifemark, Caramadre, Radhakrishnan, Estate Planning Resources, and Maggiacomo, in what is referred to as case number 09-549. Maggiacomo and the other defendants moved to dismiss all Complaints.

On June 2, 2010, this Court entered an Opinion and Order granting in part and denying in part the Defendants' motions to dismiss. Thereafter, on September 7, 2010, the Plaintiff filed a Second Amended Complaint against the defendants in case 09-471 and an Amended Complaint in 09-549. On October 4, 2010, Maggiacomo filed a Motion to Dismiss and Request for Reconsideration. The other defendants submitted a similar filing in which Maggiacomo joined. On November 17, 2010, the Plaintiff filed an Omnibus Objection to Defendants' Motions to Dismiss and for Reconsideration ("Plaintiff's Objection"). On December 10, 2010, the remaining defendants in 09-471 and 09-549 filed a Consolidated Memorandum in Response to Plaintiff's Omnibus Objection, and Maggiacomo hereby joins in and adopts the arguments made therein.

For the reasons set forth below, as well as the reasons set forth in all the previously filed Motions to Dismiss and Motions to Dismiss and Requests for Reconsideration (and their supporting memoranda), the Plaintiff's Amended Complaints should be dismissed.

ARGUMENT

I. Plaintiff's Claim for Fraud in the Factum Fails to Satisfy the Rule 9(b) Particularity Requirement Because the Plaintiff Pleads Completely Divergent Theories In the Alternative

Count II of Plaintiff's Amended Complaint (in case 09-549) alleges fraud in the factum "by either forging the annuitants' signatures to the annuity applications and submitting them to Transamerica, or by concealing the existence, nature, and essential terms of the annuity from the annuitants in order to get them to sign the applications under which they purportedly agreed to serve as annuitants." Federal Rule of Civil Procedure 9(b)[Rule 9(b)], however, requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Plaintiff's fraud in the factum claim is plainly inconsistent with the requirements of Rule 9(b), as Plaintiff attempts to avail itself of two divergent theories, rather than plead a single theory with particularity, as required.[1] See, e.g., In re Tyco International, Ltd., 2007 WL 1703023, *14 (D.N.H. 06/11/07); Premier Capital Management, L.L.C. v. Cohen, 2004 WL 2203419, *2 (N.D.Ill. 09/29/04).

Notwithstanding Rule 9(b), Plaintiff complains that it is compelled to plead in the alternative because Maggiacomo has "stalled" discovery, so as to deprive the Plaintiff of its ability to discover the evidence that would allegedly support either of its two divergent fraud in the factum theories.[2] First, as this Court is aware, Plaintiff's "inability" to pursue certain discovery from Maggiacomo at this time is by agreement of the parties and with the consent of

[1]As to 09-471, Plaintiff's Second Amended Complaint alleges fraud in the factum in Count IV, but without any specificity for the basis of this particular cause of action. Unlike Count II in 09-549, this pleading seems to incorporate by reference certain allegations concerning a failure on the part of all named defendants to disclose certain information now claimed to be material. There is, however, no specific allegation of forgery made in 09-471, nor is there any claim of failure to disclose information to the annuitants. The fraud in the factum claim in Count IV of 09-471 is essentially duplicative of Plaintiff's fraud in the inducement claim made in Count III, and has no independent significance.

[2]See, Plaintiff's Objection, at p. 16, fn. 16.

the Court for reasons not material here.[3] It is therefore completely disingenuous for Plaintiff to have agreed to certain discovery limitations, and then cite them as reason for its "inability" (i.e., failure) to comply with the rules. Second, any unavailability of discovery is immaterial in any event because Plaintiff cannot rely on discovery to satisfy the strictures of Rule 9(b).[4] See, United States ex rel. Carpenter v. Abbott Laboratories, Inc., 2010 WL 2802686, *6 (D.Mass. July 16, 2010)(" [pleader] may not circumvent Rule 9(b) with the promise that discovery will eventually fill in the missing gaps."). Here, the Plaintiff seeks to have its cake and eat it too. If fraud in the factum was a legitimate cause of action, Plaintiff should have either: (1) pled fraud in the factum based on whatever evidence it claims to have of Maggiacomo's participation in any alleged forgery of an annuitant's signature, not based on the likelihood that some of the now deceased annuitants' signatures were forged (e.g., in the case of Mr. Pitocco [case 09-470])[5]; or (2) waited to plead fraud in the factum until such time as it has the evidence (which, of course, does not exist) that Maggiacomo concealed the existence, nature and essential terms of the annuity from the annuitants in order to get them to sign the applications.[6] Plaintiff, apparently finding neither Rule 9(b) nor Rule 11 to be an impediment, has forged ahead with not one particular theory, but two utterly divergent theories of fraud in the factum. Plaintiff's fraud in the factum pleading fails to satisfy Rule 11 and is in contravention of Rule 9(b). In any event,

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[3]See the Initial Case Management Order dated September 13, 2010, entered as ECF No. 58 in case No. 09-470.

[4]Nor may Plaintiff thereby avoid Fed.R.Civ.P. 11(b)(3), which provides that by filing the pleading, Plaintiff has conducted the necessary due diligence to support its allegations.

[5]Despite the allegation of forgery and the attachment of an affidavit of forgery from Mr. Pitocco, made from the outset in 09-470, the original complaint in that case did not plead fraud in the factum.
Moreover, Plaintiff admits in its Objection (at p. 5) that with the exception of Mr. Pitocco, other annuitants signed their applications. In fact, Plaintiff concedes that the "forgery" theory is merely a "likelihood". Plaintiff's Objection, at p. 10. There is clearly no forgery properly pled within the parameters of Rule 9(b).

[6]Plaintiff is obviously familiar with these requirements. As it acknowledges, since the annuitant in case 09-502 was aware of her role and that her signature was not forged, there was no basis for a plea of fraud in the factum there. See, Plaintiff's Objection, at p. 7, fn. 5.

Plaintiff has done nothing more than to merely allege "forgery" in order to satisfy the requirement it has read into the Court's invitation to replead its claims; there is absolutely no factual support in the pleading for these allegations. Accordingly, this Court should dismiss Count II of Plaintiff's Amended Complaint. See, United States ex rel. Poteet v. Bahler Medical, Inc., 619 F.3d 104, 115-116 (1st Cir. 2010).

II. Plaintiff's Claims Fail Because Maggiacomo Had No Duty To Disclose And Made No Partial Disclosures That Could Trigger a Duty to Disclose

Plaintiff concedes that "[w]hen 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, Plaintiff's Objection, at p. 12. Here, in support of its argument that Maggiacomo had a duty to disclose the omitted fact (the health of the measuring life or the lack of relationship between the annuitant and the beneficiary/owner), the Plaintiff relies on Liberty Surplus Insurance Corp., Inc. v. First Indemnity Insurance Services, Inc., 31 So.3d 852, 854 (Fla.App. 4 Dist., 2010). Plaintiff acknowledges that in Liberty Surplus, the broker made a partial disclosure of the information that was pertinent to the fraud claim, while here, the Plaintiff alleges that Maggiacomo made no disclosure, and completely withheld material information. The Plaintiff then claims that Maggiacomo's argument that he had no duty to disclose "misses the mark." Plaintiff's Objection, at p. 22. It is the Plaintiff, however, who misses the mark—and the point. In Liberty Surplus, the broker made a partial disclosure of information that was pertinent to the fraud claim and which he had a duty to disclose. That is completely different from the circumstances here, where not only—and because—there was no duty to disclose, there were no disclosures of any facts—particularly facts which Plaintiff did not consider important enough (i.e., material) to request, but which they now claim are the most important facts of all. The gravamen of Plaintiff's fraud claim against

Maggiacomo is that he made no disclosures whatsoever. Consequently, the seminal questions are (and have always been), (a) whether there was a duty to disclose the health status of the annuitant and his/her relationship to the annuity beneficiary/owner when Plaintiff did not bother to inquire about either of these issues; and (b) whether and how either fact could be material to Plaintiff's decision to issue the variable annuity if it did not, in the first instance, make the inquiry. Paraphrasing the Court in Carolina Casualty Insurance Company v. The Cummings Agency, Inc., 110 F.3d 1, 2 (1st Cir 1997) (with reference to an insurance application), if Maggiacomo is to be taken as making a representation, is not this the place to ask him to make it? In light of the above, Liberty Surplus is clearly distinguishable.

First, and most compelling, is that if there is a duty to disclose in the first instance, the duty is to disclose fully and completely. Second, if the question seeking production of what is later claimed to be (undisclosed) material information was never asked, whether the information sought can be material at all.[7] Compare, Liberty Surplus. Here, no duty to disclose existed in the first instance, and consequently no disclosures were ever made. Therefore, the broker or agent (Maggiacomo) cannot be liable for failing to make those disclosures, particularly where, as here, the Plaintiff did not request the very information that it now, well after the fact, claims is "material."

Whether Maggiacomo had a duty to disclose the health of the annuitant is not a question of fact. Determination of whether a duty exists is a legal issue for the Court to decide. Kenney Mfg. Co. v. Starkweather & Shepley, Inc., 643 A.2d 203, 207-208 and fn. 4 (R.I. 1994). While even in the absence of an inquiry by Plaintiff no duty existed, more compelling is that when Plaintiff failed to inquire—particularly about a matter which it now claims to have been most

[7]The general rule is that failure to inquire by an insurer is a statement of non-materiality. "Put another way, materiality turns on the issue of what was being asked of the insured at the time of the application." Northwestern Mutual Life Insurance Co. v. Koch, 2009 WL 3674526, *5 (W.D.Wash. 2009)(recon.den. 2009 WL 3789944).

material—it foreclosed the possibility of any duty arising. With respect to confidential health care information, even in the context of a life insurance policy, the failure of the insurance company to inquire, even absent the legal prohibition against disclosure, gives rise to no duty to disclose, even in the case of terminal illness. Mulvihill v. American Annuity Life Insurance Co., 121 Mich.App. 192, 193-194, 328 N.W.2d 402, 402-403 (Mich.App. 1983)("[i]f defendant [insurer] wished to make a duty to disclose knowledge of terminal illnesses a condition of the policy, it should have included such a provision in the policy.").[8]

In fact, in a case strikingly similar to this one, the insurance company lost precisely the same argument it makes here in circumstances where the defendant husband (himself an insurance agent) obtained 17 credit life insurance policies on his wife's life after learning of—and failing to disclose—her terminal illness. USLife Credit Life Insurance Co. v. McAfee, 29 Wash.App. 574, 580, 581, 630 P.2d 450, 455 (Wash.App. 1981), rev.den., 97 Wash.2d 1004, 1982 WL 226224 (Wash. 1982):

> In short, to impose a duty on every insurance applicant to fully disclose the state of his or her health where the insurer does not request that information would be to build a trap for all purchasers of life and health insurance. Such a holding would be precedent allowing any life or health insurer so inclined, whenever a claim is presented, to use the 20-20 vision of hindsight to seek out prior health problems in order to try and defeat the claim.

This controversy over the medical information requires the Court to focus on an issue raised earlier: whether and to what extent it was even legally possible or permissible for

[8]Mulvihill distinguished a contrary Florida case, National Life Insurance Co. v. Harriott, 268 So.2d 397 (Fla.App. 1972), because it was based on a Florida statute that required the disclosure. Accord, Block v. Voyager Life Insurance Co., 251 Ga. 162, 165, 303 S.E.2d 742, 745 (Ga. 1983)(life policies not void when insured failed to disclose terminal illness where no health questions ever asked and policy contained no exclusion for preexisting health problems), noting that "the reasoning of the Harriott case has generally not been followed in other jurisdictions. See Readey, 'Cancer Cases-The Achilles Heel of Credit Life Insurance.' Insurance Counsel Journal, Vol. L, No. 2, p. 241 (1983)." See also, Executive Risk Indemnity, Inc. v. AFC Enterprises, Inc., 510 F.Supp.2d 1308, 1329-1330 (N.D.Ga. 2007).

Maggiacomo—or any agent—to disclose confidential health care or medical information to the insurance company absent (a) a specific request therefor and (b) a release authorizing the disclosure.[9] The information not provided but which the Plaintiff now claims was "material" was confidential healthcare information that is specifically prohibited from disclosure by federal and state law. See, e.g., 42 U.S.C. §1320d-6; R.I.G.L. §5-37.3-4. While it is routinely requested (by the same insurance companies) in life insurance applications, and provided pursuant to releases signed by the insured, there is no such protocol here.

Even in circumstances involving information not as sensitive as confidential health care or medical data, where disclosure of adverse material facts is required by an implied duty—or even by a statutory provision—there exists an exception for disclosures which are prohibited by law. See, e.g., Shister v. Patel, 322 Wis.2d 222, 233, 776 N.W.2d 632, 638 (Wis.App. 2009); McCabe v. Snyder, 75 Cal.App. 4th 337, 345, 89 Cal.Rptr.2d 315, 320 (Cal.App. 3rd Dist. 1999).

The Court must not be misdirected by the Plaintiff's unabated and unabashed efforts to convert this into an insurance case. It is not. It is a variable annuity case. The Court previously recognized this in rejecting the Plaintiff's insurable interest claim. See, Opinion and Order, 6/2/10, at pp. 12, et seq.

Additional evidence of the lack of materiality of the heath status of the annuitants is Plaintiff's complete failure to acknowledge the existence and applicability of the federal and state laws prohibiting the disclosure of individual-specific, identifiable health care information. Even Plaintiff's own Exhibit C (the Agent Appointment Agreement [which, as argued below, should be stricken for other reasons]) requires that the agent "comply with all applicable federal, state, and local laws, including [those] requiring [the agent] to protect the privacy of nonpublic

[9]This issue was initially raised by Lifemark in its Reply Memorandum in Support of its original Motion to Dismiss in 09-471 (ECF Document 41), at p. 5, and fn. 9.

information [concerning an annuitant]." Absent such a legally conforming protocol, no agent, including Maggiacomo, could have legally provided the information now claimed to be material but never sought. And Plaintiffs in these proceedings are specifically aware of these requirements, even in a life insurance case (where the information is most often required for the issuance of the policy). See, Kimmel v. Western Reserve Life Assurance Co. of Ohio, 2010 WL 4721583, *5-6 (7th Cir. 11/23/10).

The Plaintiff also claims that its theory of fraud is based "both on material omissions and affirmative misrepresentations." First, the omissions to which the Plaintiff refers cannot reasonably or plausibly be deemed material. The Plaintiff (not Maggiacomo) drafted the annuity applications, and crafted the form to seek all the information that it considered important—and, therefore, material—then and now. The Plaintiff could have asked for whatever information it wanted and/or believed it needed in order to make the best decisions on whether to accept an application. The Plaintiff certainly requested a host of information on the applications. The Plaintiff did not, however, ever even inquire about the health of the measuring life, or pursue the relationship of the measuring life to the beneficiary/owner.[10] The Plaintiff could have asked for that information if it truly deemed it material—at the time. The Plaintiff, a very sophisticated insurance company, plainly knew how to craft such questions, but did not do so. It was certainly entitled and able to ask such questions, but *decided* not to do so; however, the Plaintiff, now with

[10]The Court's earlier ruling that there is no insurable interest requirement in these non-insurance cases (see, Opinion and Order, 6/2/10, at pp. 12-19; pp. 34-35 and fn. 13; and pp. 40-41) should put an end to the Plaintiff's argument that failure to disclose the relationship between the annuitant and the beneficiary/owner was material. It clearly was not.

More importantly, this Court has previously ruled, in the matter of Nationwide Life Insurance Company v. Steiner, C.A. No. 09-235-S, that the insurance company "waived the right to challenge any omission in the application when it issued the policy." See, Opinion and Order, 7/13/10, No. 09-235, ECF Document 25, at p. 16. The same rule should apply here.

the benefit of its litigation-oriented hindsight, cannot claim that the information it deliberately elected not to seek is material, and the failure to disclose it was therefore fraudulent.[11]

Second, unlike the agents in Liberty Surplus, Maggiacomo made no disclosures at all with respect to the health of the measuring life and the relationship of the annuitant to the beneficiary. Unlike the type of partial disclosures made in Liberty Surplus, Maggiacomo did not provide certain, but incomplete, information about the health of the measuring life and the relationship of the annuitant to the beneficiary, and then deliberately leave out other important pieces of information. Here, the Plaintiff asked for no information on these two discrete subjects, and Maggiacomo, in turn, provided no information on these two discrete (and unrequested) subjects. Maggiacomo, having no duty, made no disclosure whatsoever, partial or otherwise. Consequently, no further duty to disclose completely was triggered in the first instance, and Plaintiff's claims for fraud fail as a matter of law. Accordingly, this Court should dismiss Plaintiff's Amended Complaints.

III. Plaintiff's Purported "Agency By Estoppel" Claim Fails Because Plaintiff filed a Direct Claim Against Maggiacomo As the Agent.

Plaintiff alleges that Maggiacomo was an agent for Estate Planning Resources. That allegation is unsupported by facts or law. In support of its contention, the Plaintiff relies on a single piece of letterhead that erroneously describes Maggiacomo as the "Vice President" for Estate Planning Resources. See, Maggiacomo Letter attached to the Plaintiff's Objection as Exhibit A.

First, notwithstanding the inaccurate notation on the letterhead, Maggiacomo was plainly not the "Vice President" of Estate Planning Resources, as Estate Planning Resources was not

[11]As all the defendants have argued previously, both Plaintiffs, in their voracious and insatiable pursuit of market share and its financial rewards, eschewed any inquiry that might have resulted in reducing or restricting the pool of potential applicants.

incorporated at the time the letterhead was printed and used, and there was no corporate entity for which Maggiacomo could have served as "Vice President."[12] At some point in time, Estate Planning Resources apparently erroneously noted on its letterhead that Maggiacomo was a "Vice President." Estate Planning Resources could have listed Maggiacomo as "Leader of the Free World," but such a notation would have been no more accurate than the notation that Maggiacomo was its "Vice President." Simply stated, Estate Planning Resources' erroneous notation on a piece of stationery that Maggiacomo was its "Vice President" cannot transform Maggiacomo into its agent.[13] Accordingly, the Plaintiff's claims based on Maggiacomo's alleged agency for Estate Planning Resources should be dismissed.

IV. Exhibit C to Plaintiff's Objection Should Be Stricken

In support of its Omnibus Objection, the Plaintiff attached a blank, unsigned Application for Appointment Agreement as Exhibit C. This document was never signed by Maggiacomo and

[12]In this regard, it is telling that Plaintiff does not point to, reference or attach any of the records of the Office of the Rhode Island Secretary of State (which would reflect the accurate history of all corporate entities, including Estate Planning Resources) to show that Maggiacomo was ever a "Vice President" of Estate Planning Resources. Had Plaintiff checked the records, Plaintiff would have learned that Estate Planning Resources was not incorporated at the time this letterhead was used, and that Maggiacomo was never its "Vice President."

Moreover, Plaintiff's Exhibit A is deliberately misleading. The Exhibit uses a letterhead from an unincorporated business that had not been in use for years. There is also no date on the document to indicate when it was written. Estate Planning Resources, Inc. was incorporated on January 18, 2006, and located at 1000 Chapel View Boulevard, Suite 270, Cranston, RI. The following email traffic is from 2009. But an effort is made to connect the letterhead to the several pages of emails that follow it, because the emails refer to Mr. Conley, who is addressed in the note on the letterhead. As the Bates stamp indicators show, these documents were produced by different entities and catalogued differently. The letterhead has nothing to do with the email traffic that follows it; but Plaintiff attempts to suggest to the court that they are connected by batching them together as an exhibit—an exhibit, by the way, that is improperly before the Court in the context of a 12(b)(6) motion.

[13]The Plaintiff's agency claim appears to be one centered on an "agency by estoppel." In other words, the Plaintiff appears to be claiming that because Maggiacomo was held out (apparently by Estate Planning Resources) as Estate Planning Resources' "Vice President," that means Maggiacomo was its agent or Estate Planning Resources should be estopped from denying or disclaiming the purported agency. Such a theory might make sense if it were asserted against the purported principal (Estate Planning Resources), and if the purported principal were attempting to avoid liability for the acts of its purported agent. In such cases the party alleging "agency by estoppel" is generally not proceeding against the purported agent, but instead is asserting claims against the principal. In this case, however, the Plaintiff's claims are direct ones asserted against the alleged agent, Maggiacomo, and they seek to hold Estate Planning Resources, as the purported principal, liable for Maggiacomo's alleged "unjust enrichment." However, as shown above, Maggiacomo was neither Estate Planning Resources' Vice President, nor its agent. Rather, he was at all times an independent contractor unconnected to any liability of Estate Planning Resources.

is wholly irrelevant. The agreement Maggiacomo signed was with Life Investors Insurance Company of America for the sale only of fixed life insurance products. It did not allow him to sell variable annuities, and was therefore not applicable to variable annuity transactions, which are the only transactions at issue in these complaints. Accordingly, Exhibit C should be disregarded and stricken.

CONCLUSION

For the foregoing reasons and for those set forth in the previous pleadings filed by Maggiacomo as well as the other defendants (all of which are incorporated herein), the Plaintiff's Amended Complaints should be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2010, 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/ Anthony M. Traini
Anthony M. Traini