**UNITED STATES DISTRICT COURT**
**DISTRICT OF RHODE ISLAND**

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| WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO,<br>Plaintiff,<br><br>vs.<br><br>JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., HARRISON CONDIT, and FORTUNE FINANCIAL SERVICES, INC.,<br>Defendants. | C.A. No.: 09-470-WS |
| TRANSAMERICA LIFE INSURANCE COMPANY,<br>Plaintiff,<br><br>vs.<br><br>JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ESTELA RODRIGUES, EDWARD MAGGIACOMO, JR., LIFEMARK SECURITIES CORP., and PATRICK GARVEY,<br>Defendants. | C.A. No.: 09-471-WS |
| WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO,<br>Plaintiff,<br><br>vs.<br><br>JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ADM ASSOCIATES, LLC, EDWARD HANRAHAN, THE LEADERS GROUP, INC., and CHARLES BUCKMAN,<br>Defendants. | C.A. No.: 09-472-WS |

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| WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO,<br>Plaintiff,<br><br>vs.<br><br>JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., DK LLC, EDWARD HANRAHAN, THE LEADERS GROUP, INC., and JASON VEVEIROS,<br><br>Defendants. | C.A. No.: 09-473-WS |
| WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO,<br>Plaintiff,<br><br>vs.<br><br>JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., NATCO PRODUCTS CORP., EDWARD HANRAHAN, and THE LEADERS GROUP, INC.,<br><br>Defendants. | C.A. No.: 09-502-WS |
| TRANSAMERICA LIFE INSURANCE COMPANY,<br>Plaintiff,<br><br>vs.<br><br>LIFEMARK SECURITIES CORP., JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC. and EDWARD MAGGIACOMO, JR.,<br><br>Defendants. | C.A. No. 09-549-WS |

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

**CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS ADM ASSOCIATES LLC, ESTELA RODRIGUES, JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., AND HARRISON CONDIT'S CONSOLIDATED MOTION TO DISMISS THE NEWLY AMENDED COMPLAINTS AND REQUEST FOR RECONSIDERATION**

## I. INTRODUCTION

Defendants ADM Associates, LLC ("ADM"), Estela Rodrigues (Ms. Rodrigues), Joseph Caramadre ("Mr. Caramadre"), Raymour Radhakrishnan ("Mr. Radhakrishnan"), Estate Planning Resources, Inc. ("EPR"), and Harrison Condit ("Mr. Condit")[1] (collectively, "Defendants") in the above-captioned matters (collectively, the "Aegon Civil Actions")[2] hereby file this Consolidated Memorandum of Law in Support of Defendants' Motions to Dismiss the Newly Amended Complaints and Requests for Reconsideration, seeking dismissal of all counts pending against them in the Aegon Civil Actions.

[1] Mr. Condit and co-defendants Edward L. Maggiacomo, Jr. and Edward Hanrahan are referred to collectively herein as "the Agents," the term the Court used in the *Opinion and Order* of June 2, 2010 (in Defendants' earlier-filed papers, including the memoranda attached hereto, the term "Independent Representatives" is used to refer to these same defendants). These individuals were the agents of the Owners, such as Ms. Rodrigues, who purchased the annuities, representing the Owners through the application process for the annuity contracts.

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

Defendants hereby incorporate by cross-reference all of their respective arguments, as well as the introductory material, background sections, and exhibits, which they previously filed in support of their earlier-filed motions to dismiss and requests for reconsideration with respect to the Aegon Civil Actions. These filings include:

1. Defendants' initial memoranda and consolidated reply memorandum (filed with this Court on or about November 13, 2009; January 13, 2010; and February 22, 2010), which they filed in support of their initial motions to dismiss the above-referenced actions; and

2. Defendants' consolidated initial and reply memoranda (filed with this Court on or about October 4, 2010 and December 10, 2010, respectively), which they filed in support of their renewed motions to dismiss and requests for reconsideration following Plaintiffs' first round of major amendment to their complaints.

With the exception of the addition of certain facts to which the Aegon Companies have admitted and which are referenced in the background section below, this memorandum, therefore, has a narrow focus. It addresses only the amendments newly effected by way of the Aegon Companies' newly amended complaints, filed with this Court on or about March 7, 2011; specifically, Plaintiff WRL's substantive changes in the form of newly added claims against Mr. Condit in C.A. Nos. 09-564 and 09-470 for (1) breach of contract, and (2) breach of duty of good faith and fair dealings. The Court should dismiss these newly added claims because they rest on precatory language that WRL misconstrues and that imposed no relevant obligations on Mr. Condit. Indeed, WRL's interpretation of the alleged contract terms would undermine the company's own ethical code, a code which purports to subordinate WRL's unbridled self-interest to the financial objectives of its investing customers.

## II. BACKGROUND

### A. AEGON'S ADMISSIONS

The Defendants summarized, in their filings incorporated by cross-reference above, Aegon's major allegations in its complaints as they regard the claims that Defendants addressed in those dismissal papers. Defendants write here separately to update the Court with respect to supplemental facts that Aegon has admitted to in answering the counter-claims brought against it by the broker-dealer companies. Attached as *Exhibit A* is an illustrative exhibit cataloging Aegon's admissions in five of the seven Aegon Civil Actions as indicated. Aegon's admissions included that WRL and Transamerica were sole drafters and/or were solely responsible for the prospectuses, application forms, and contracts for the underlying annuities. WRL, specifically, has admitted that it is a "sophisticated business entity in the financial markets," and in C.A. Nos. 09-471 and 09-549, Transamerica has made numerous additional and telling admissions including the following:[3]

- Its annuities are "form contracts";
- It "charged to the annuity subaccounts daily mortality and expense risk fees" and "expected to profit from these charges for death benefits";
- "[A]t all times," it was "free to request any information" that it "wanted to receive about the prospective" owner-investors, beneficiaries, and annuitants;
- At no time until the present controversy has Transamerica informed the broker-dealer (in those cases, LifeMark Securities Corp.) that it expected

[3] WRL and Transamerica would, presumably, make the same admissions in response to identical allegations in the other Aegon Civil Actions, the gravamen of its claims and of the underlying contract materials being materially identical. They have not done so with respect to two of the actions, C.A. Nos. 09-470 and 09-564, for the simple reason that Fortune Financial has yet to state counter-claims in those actions providing the occasion for the admissions; instead, it has contested the adequacy of WRL's allegations altogether by way of motions to dismiss. In the remaining actions, C.A. Nos. 09-472, 09-473, and 09-502, similarly, it appears that Aegon has not made these admissions only because the broker-dealer in those actions, The Leaders Group, Inc. ("Leaders Group"), did not include the corresponding allegations in its recitation of its counterclaims. Leaders Group did include, and Aegon admitted to, similar allegations with regard to WRL's status as a sophisticated business entity exclusively responsible for the contents of the annuity and the prospectus. *See Exhibit A.*

the broker-dealer to provide medical and health information and/or relationship information in connection with the application and issuing process for annuities;

- It alone "controlled the assumptions used by the application";
- Health conditions of the annuitants were "not a factor" that it considered in making its "actuarial assumptions" for the annuities; and
- It would not accept applications unless they met the requirement of being "in good order" and it accepted the applications for the annuities at issue as being "in good order."

These admissions further establish that there was no duty to disclose and that Aegon waived any such claim for fraud based on the non-disclosure of information about which it did not inquire.

## B. THE NEWLY AMENDED COMPLAINTS

In the newly amended complaints, WRL alleges that Mr. Condit breached an agreement with WRL to follow the terms of WRL's "Code of Professional Conduct" ("Code"), state law, and WRL's "rules and regulations." *See Second Am. Compl.*, C.A. No. 09-564, ¶ 121; *Third Am. Comp.*, C.A. No. 09-470, ¶ 81. WRL cites to Mr. Condit's "Producer Appointment Application" as the source of his commitment to comply with these provisions. *See Second Am. Compl.*, C.A. No. 09-564, ¶ 121; *Third Am. Comp.*, C.A. No. 09-470, ¶ 81. The Producer Appointment Application that WRL refers to is attached hereto as *Exhibit B*.[4]

WRL provides no detail to support its breach of contract claim in its amended pleadings C.A. No. 09-564, alleging little more than that Mr. Condit "was bound" by a contract and that he "breached his contractual obligations" to WRL. *See Second Am. Compl.*, C.A. No. 09-564,

[4] This Court may of course consider the Producer Employment Application (*Exhibit B*) and the "Ethics Code" (*Exhibit C*) in the context of a Rule 12(b)(6) motion to dismiss because the complaint is "expressly linked to" and "admittedly dependent upon" these documents. *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.").

¶¶ 122-123.

In the other action, C.A. No. 09-470, WRL provides additional detail in support of its breach of contract claim. That detail comes *only* from what WRL now terms its "Ethics Code" (the "Code"). *See Third Am. Comp.*, C.A. No. 09-470, ¶ 83. WRL alleges that Mr. Condit breached his obligations under the Code "to conduct himself 'according to the high standards of honesty and fairness,' to use 'appropriate fact finding tools' to assist customers [in] determin[ing] their 'insurable needs and financial objectives,' and to sell products that meet customers' 'insurable needs or financial objectives.'" *Id.*

The Code itself, attached hereto as *Exhibit C*, places these allegations in context. In the Code, the Company commits "*itself*, in the sale of its insurance products . . . [t]o conduct business according to high standards of honesty and fairness and to treat our *customers* as we would expect to be treated." *Exhibit C* (First Page, Bates Stamped AEGUSA0005114) (emphasis added). Further down the page, WRL includes a section entitled "Meet the Needs of its *Customers*" form which WRL draws additional language that it quotes in its breach of contract allegations with respect to C.A. No. 09-470:

> The Company *encourages* its distributors to assist *customers* in determining *the customers'* insurable needs and financial objectives in the marketing and sale of its products, including through the use of appropriate fact-finding tools.

*Id.* (emphasis added).

In its breach of the duty of good faith and fair dealings ("implied covenant") claims, WRL alleges that Mr. Condit acted "for a purpose contrary to that for which the contract" between Mr. Condit and WRL was made. *See Second Am. Compl.*, C.A. No. 09-564, ¶ 128; *Third Am. Comp.*, C.A. No. 09-470, ¶ 89. In C.A. No. 09-564, WRL seeks to use the implied covenant to import a series of contractual obligations that it has chosen not to include in either its

annuity contracts or its alleged contract with Mr. Condit, referencing a purported duty to vet annuitants and report on any proposed annuitant's health condition to WRL, to disclose the alleged lack of an insurable interest between investors and annuitants, to disclose alleged forgery of an annuitant's signature,[5] and not to "provid[e]" annuity applications to EPR, Mr. Caramadre and/or Mr. Radhakrishnan in the process of pursuing sales of WRL's products. *See Second Am. Compl.*, C.A. No. 09-564, ¶ 128. WRL makes a similar allegation in C.A. No. 09-470, referencing, additionally, the alleged forgery of Mr. Pitocco's signature by an unnamed person "or," in a conflicting alternative allegation, "payments to [the annuitant] to induce him to sign the application."[6] *Third Am. Comp.*, C.A. No. 09-470, ¶ 89.

## III. ARGUMENT

### A. WRL FAILS TO STATE CLAIMS FOR BREACH OF CONTRACT AGAINST MR. CONDIT.

The Court should dismiss WRL's breach of contract claim against Mr. Condit in C.A. No. 09-564 because its allegation that Mr. Condit "was bound" by a contract and "breached his contractual obligations," *see Second Am. Compl.*, C.A. No. 09-564, ¶ 123, fails to provide any "plausible" factual basis for WRL's claim. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (holding that to survive a motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007))); *see also In re Citigroup, Inc.*, 535 F.3d 45, 52 (1st Cir. 2008) (holding courts are "free to disregard 'bald assertions, unsupportable conclusions, and

[5] As Defendants argued previously, the Court should dismiss the forgery allegations in this action because they are simply speculative: WRL offers no factual support, in this multiple-annuity action, for its claim that any Defendant forged any of the annuitants' signatures.

[6] Defendants explain in their previously filed papers that the forgery allegations with respect to Mr. Pitocco's name are also inadequate.

opprobrious epithets'" in weighing the sufficiency of pleadings on a motion to dismiss (quoting *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 4 (1st Cir. 2007))).

The Court should also dismiss WRL's breach of contract claims, in both actions, because the Code does not support them.[7] The Code represents WRL and its agents' commitment to serve *customers'* needs in an ethical fashion, but it fails to set forth any special or additional commitment by the agents to WRL. Also, the Code provisions that WRL relies upon are precatory. A cursory review of the Code reveals both of these deficiencies in WRL's allegations.

WRL relies primarily on the Code language that "[t]he Company *encourages* its distributors to assist *customers* in determining *the customers'* insurable needs and financial objectives in the marketing and sale of its products, including through the use of appropriate fact-finding tools." *Exhibit C* (First Page, Bates Stamped AEGUSA0005114) (emphasis added). This language, however, does not impose a contractual obligation on Mr. Condit because it does not purport to require agents to do anything with respect to WRL or the annuitants. *See Mattles v. ABC Plastics, Inc.*, 323 F.3d 695, 699-700 (8th Cir. 2002) ("precatory" language "gives rise to no specific contractual duty"); *Corcoran v. Chicago Park Dist.*, 875 F.2d 609, 612 (7th Cir. 1989) ("no enforceable contract is formed unless there has been communication of a clear and explicit promise"; "precatory language" is not enough). It does not require them to deploy "fact-finding tools;" it does not require them to vet annuitants; and it does not require them to investigate whether proposed annuitants have any relationship to the owners-customers or beneficiaries of the annuity; rather, it simply "encourages" them to take into account the *customers'* (the annuity owners') interests. Essentially, WRL is suggesting as an ethical goal

[7] WRL refers in passing to "regulations" and "state law" but mentions only the Code in any detail in support of its claims.

that it will *forego* potential advantages to WRL in the interest of fostering ethical treatment of its *customers*. Because this language does not require agents to do anything vis-à-vis named annuitants or WRL itself, it cannot form the basis for a valid breach of contract claim. Indeed, the fact that WRL's own language encourages agents to help customers, potentially at the expense of WRL's own profit margin, further undermines its breach of contract claim. Significantly, the customers – i.e., the individuals and companies who purchased the annuities, let alone the annuitants – have brought no claims and raised no complaints against Mr. Condit for advancing the owners' interests in a profitable investment that WRL designed and accepted on its own terms.

The other language that WRL relies upon – namely, the language referring to "high standards of honesty and fairness" – is also aspirational. *Id.* By the terms of the Code itself, this is merely a "principle" that "the Company" commits itself to. *Id.* It is WRL's statement of its own general goals for itself; but it is not a binding contractual obligation for agents. As such, it cannot form the basis for a valid breach of contract claim against Mr. Condit. Furthermore, this language, like the other language that WRL relies upon, serves as an aspirational ethical constraint on WRL's interests vis-à-vis its customers (and their agents), but not the other way around. WRL purports in its Code to restrict its own avarice in the service of its customers' financial needs. But now it tries to transmogrify this same language into some type of contractual mandate that requires its customers (through their agents) to make numerous disclosures that WRL made a calculated choice to forego when it designed its investment products. The Court should reject WRL's baseless attempt to do so and should dismiss both breach of contract claims.

## B. WRL FAILS TO STATE CLAIMS FOR BREACH OF THE IMPLIED COVENANT.

WRL also claims that Mr. Condit breached the implied duty of good faith and fair dealing. Under Rhode Island law, "'virtually every contract contains an implied covenant of good faith and fair dealing between the parties.'" *Hord Corp. v. Polymer Research Corp. of Am.*, 275 F. Supp. 2d 229, 237 (D.R.I. 2003) (Lagueux, S.J.) (D.R.I. 2003) (quoting *Dovenmuehle Mortgage, Inc. v. Antonelli*, 790 A.2d 1113, 1115 (R.I. 2002)). "Rhode Island has adopted the covenant to ensure that contractual objections are achieved." *Id.* (citation omitted). "The covenant of good faith is required as a counterpromise that the promisee will act in a manner consistent with the purposes of the contract." *Id.* (citation omitted). "'A party's actions do not violate the covenant of good faith and fair dealing when they [the challenged actions] were contemplated by the parties at the time of contract formation.'" *Textron Fin. Corp. v. Ship & Sail, Inc.*, 2011 U.S. Dist. LEXIS 9650, *23 (D.R.I. Jan. 31, 2010) (quoting *Hord Corp.*, 275 F. Supp.2d at 238). The parties' contractual objectives "form the permissible bounds of the good faith requirement for a given contract." *Hord Corp.*, 275 F. Supp.2d at 238.

As an initial matter, the Court should dismiss these claims because the viability a claim of this variety depends upon the plaintiff's identification of an underlying breach of contract. WRL has failed to state valid claims for breach of contract and therefore has failed to state claims for breach of the implied covenant. *See Barkan v. Dunkin' Donuts, Inc.*, 2009 U.S. Dist. LEXIS 84353, *29 (D.R.I. May 26, 2009) (*dicta*) (Martin, M.J.) (explaining that "[i]f Dunkin' had established no breach of contact as a matter of law with the instant Motion, its argument that the breach of covenant claim should also fail may have had merit" (citing *Hord Corp.*, 275 F. Supp. 2d at 237 ("While every breach of the covenant of good faith and fair dealing implicates a breach of contract, not every breach of contract necessarily involves a breach of the covenant."))),

*adopted by*, 2009 U.S. Dist. LEXIS 84346 (D.R.I. September 15, 2009); *see also Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1429 (11th Cir. 2009) (the covenant is "not an independent contract term" and is not "subject to breach apart from any other").

Even if this Court were to reject that view and interpret the implied covenant more broadly, the Court should dismiss WRL's implied covenant claims against Mr. Condit. WRL's claim is that Mr. Condit subverted the purposes of the alleged WRL-Condit agreement by concealing the condition of the annuitants' health, failing to disclose alleged forgery of one or more annuitants' signatures, failing to disclose the owners' lack of an insurable interest in the annuitants, etc. *See Second Am. Compl.*, C.A. No. 09-564, ¶ 128; *Third Am. Comp.*, C.A. No. 09-470, ¶ 89. But WRL again ignores that the Code is a document promoting WRL's standard of service to WRL's customers, but not one that limns the agents' standard of service to WRL. Indeed, it imposes no obligations whatsoever on agents vis-à-vis WRL, and its aspirational provisions simply encourage agents to serve WRL's customers in the fashion described. Of course, WRL does not and cannot allege that Mr. Condit failed to meet that standard of service with respect to WRL's customers (the owners of the annuities) or that he deprived them of the fruits of their contracts with WRL. On the contrary, the owners found the contracts quite suitable to their financial needs and they continue to seek to enforce the contracts according to their terms. If anyone has breached the covenant, it is WRL that contravenes the Code and breaches the covenant of good faith and fair dealing in the annuity contracts by attempting to eviscerate the money-back guarantee in the annuity contracts, a provision for which WRL's customers paid premium fees to WRL. Its implied covenant claims, if left to stand, would turn WRL's ethical code on its head.

Furthermore, Mr. Condit should not be held responsible for any losses suffered by WRL because Mr. Condit sold the WRL contracts according to the terms that WRL drafted. If the market turned south prior to an annuitant's passing, and the customer exercised the death-benefit feature, it was the intersection of the vagaries of the market with WRL's own contract, not Mr. Condit, that deprived WRL of its hoped-for profit. If, conversely, the market value of the investments increased, and the customer opted to hold on to the contract after the annuitant died, WRL would retain the death-benefit premium and turn a handsome profit based on the same conduct that it alleges was wrongful. That the same conduct could have led to both beneficial and non-profitable outcomes demonstrates that Mr. Condit did not and could not be responsible for the ultimate profits or losses of WRL.

The Court should also reject WRL's plea to re-write the annuity contracts according to WRL's warped notion of "fairness." *See Estate of Meller v. Adolf Meller Co.*, 554 A.2d 648, 653 (R.I. 1989) ("It is not the function of the court to rewrite a contract according to its notions of fairness."). WRL's arrangement with Mr. Condit authorized Mr. Condit to sell WRL products to customers in the form that WRL crafted them. In that form, WRL required none of the disclosures that WRL is now seeking before it issued the contracts in question; and its customers paid premium fees in exchange for having the right to a money-back guarantee in the form of the death-benefit feature without submitting annuitants to a health or relationship vetting process. Adding an annuitant vetting requirement *ex post facto* would turn WRL's money-back guarantee, like the ethical code, on its head, guaranteeing a windfall of profit to WRL. This would rewrite the contract by affording WRL rights for which it did not bargain while at the same time imposing upon WRL's customers (and their agents) obligations that the customers paid a premium to avoid.

## IV. CONCLUSION

For these reasons and those previously set forth in the Defendants' prior memoranda (incorporated herein by cross-reference), the Defendants respectfully request that the Court dismiss all counts brought against the Defendants in the above-captioned complaints with prejudice.

Respectfully submitted,

DEFENDANTS JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ADM ASSOCIATES LLC, ESTELA RODRIGUES, AND HARRISON CONDIT

By their Attorneys,

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DATED: March 24, 2011

## CERTIFICATION

I hereby certify that on March 24, 2011, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system.

*/s/ Robert G. Flanders, Jr.*