NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
FORSYTH COUNTY	)	09 CVS 4007
	)	
BB&T BOLI PLAN TRUST,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
MASSACHUSETTS MUTUAL LIFE INS. CO. and CLARK CONSULTING, INC.,	)	
	)	
Defendants.	)	
	)	

DEFENDANT MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

Page

Table of Contents
(continued)

Page

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

STATUTES, RULES & REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

This dispute involves bank-owned life insurance ("BOLI") Plaintiff BB&T BOLI Plan Trust's ("BB&T") acquired from MassMutual in August 2006. The Policy is "variable;" therefore, its cash surrender value fluctuates with the performance of the "separate account" investments to which BB&T allocated its premiums. BB&T claims MassMutual breached "reallocation" obligations after one of the policy's investment divisions (the Falcon Strategies Division) declined in value in August and November 2007.

BB&T sued MassMutual and Clark Consulting, Inc. ("Clark") in the Superior Court of Forsyth County, North Carolina on May 9, 2009. BB&T asserted six counts against MassMutual: breach of fiduciary duty, negligence, negligent misrepresentation, breach of contract, fraud, and violation of North Carolina's Unfair and Deceptive Trade Practices Act. Each claim was premised on MassMutual's alleged failure to monitor the Falcon Fund's performance and advise BB&T of its rights. [Complaint ¶¶ 81, 86, 91, 101, 104, 111]. Both MassMutual and Clark moved to dismiss BB&T's Complaint on July 20, 2009.

After seeking an extension of time to respond to the motions to dismiss, BB&T filed a First Amended Complaint, asserting its original claims and a new claim for aiding and abetting breach of fiduciary duty (Count II). The Amended Complaint relies on conclusory allegations, masquerading as facts, that are, in many instances, rebutted by the underlying contractual documents on which BB&T relies.

Despite the Amended Complaint, BB&T's contract claim still fails because MassMutual owed no duty to BB&T to effect a reallocation -- even if a "Reallocation Event" occurred in August 2007.[1] Instead, any reallocation obligation could arise *only* under a "Stable Value

[1] For purposes of this motion only, MassMutual accepts as accurate the factual allegations in BB&T's Amended Complaint.

Agreement" ("SVA") between MassMutual and Bank of America. Because BB&T is neither a party to nor a third party beneficiary of the SVA, the contract claim is based on alleged contractual rights BB&T does not possess.

Similarly, the Amended Complaint cannot salvage BB&T's tort claims. These claims are defective as a matter of law because BB&T cannot turn what is, at most, a contractual dispute into a tort action. Consequently, BB&T's Amended Complaint should be dismissed with prejudice.

II. FACTS

A. Overview of BOLI Products and Stable Value Agreements

BB&T inaccurately portrays the essential elements of BOLI transactions, creating the appearance that BB&T possessed contractual rights belonging to other parties. Indeed, BB&T's claims are based on the SVA, an agreement to which BB&T was neither a party nor a third party beneficiary. Accordingly, a brief overview of BOLI products is required to place BB&T's claims in proper context.

1. Typical Purposes For BOLI Products

Financial institutions often use life insurance to finance pre- and post-retirement employee benefits. *See* Office of the Comptroller of the Currency Bulletin 2004-56 ("OCC 2004-56") at 23 (Exhibit A to MassMutual's motion).[2] In such cases, the financial institution "insures the lives of directors or employees in whom it has an insurable interest to reimburse the institution for the cost of employee benefits." *Id.*

[2] OCC 2004-56 is an *interagency* statement, attached to the OCC Bulletin, by the OCC, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision. All references to OCC 2004-56 are to the attachment.

BOLI policies offer certain tax benefits: "[B]ecause the cash flows from a BOLI policy are generally income tax-free *if the institution holds the policy for its full term*, BOLI can provide attractive tax-equivalent yields to help offset the rapidly rising cost of providing employee benefits." OCC 2004-56 at 1 (emphasis added). But there are corresponding limitations on a bank's ability to "control" the underlying investments and disincentives against premature policy surrenders.

2. Stable Value Providers

BOLI transactions often involve "stable value providers," which are typically separate financial institutions. In such cases, there will be a separate SVA between the insurer and a stable value provider (the policyholder is typically not a party). This structure offers protection against: (1) investment losses that could impact the policy's cash surrender value; and (2) income statement volatility (for financial accounting).

3. "General" Versus "Separate" Account BOLI Policies

General account BOLI policy cash surrender values are supported by an insurer's general account (i.e., assets the insurer uses to pay all creditors and policy claimants). Conversely, "separate account" BOLI policy cash surrender values are supported by an account distinct from the insurer's general assets. Although the policyholder neither controls the investments nor owns the funds in the separate account, the policyholder can allocate premiums to different investment divisions within the account and bears the risks associated with the investment performance of those divisions. OCC 2004-56 at 3 n.1.

Separate account policies offer greater transparency (disclosure of costs). OCC 2004-56 at 13. They also provide lower credit risk because separate accounts are beyond the reach of the insurance company's general creditors. OCC 2004-56 at 13.

4. Pre-Purchase Due Diligence

While the Amended Complaint portrays BB&T as a naïve consumer, the OCC actually requires banks to conduct careful pre-purchase due diligence including "a comprehensive risk management process for purchasing and holding BOLI." OCC 2004-56 at 4. This includes a "thorough pre-purchase analysis of BOLI products." OCC 2004-56 at 4.

While prohibited from "controlling" investment decisions, policyholders may allocate their premiums among investment "divisions" within the separate account. OCC 2004-56 at 13. "[A]n institution's management should thoroughly review and understand the instruments governing the investment policy and management of the separate account." OCC 2004-56 at 16.

5. Liquidity Risk

BOLI policies are illiquid assets because (1) policyholders receive no cash flow until an insured employee dies or the policy is surrendered; and (2) premature policy surrenders can trigger surrender charges and tax liabilities. OCC 2004-56 at 11. Further, SVAs often restrict withdrawals "thereby reducing the liquidity of the BOLI asset." OCC 2004-56 at 12.

6. SVAs, Accounting Concerns, and Price Risk

"Price risk" is addressed when a stable value provider agrees, in return for contractually-defined fees, to protect against decreases in market value:

> In general, the provider of an SVP contract agrees to pay any shortfall between the fair value of the separate account assets when the policy owner surrenders the policy and the cost basis of the separate account to the policy owner.

OCC 2004-56 at 15. With a typical SVA, if the assets' fair market value is less than cost basis at policy surrender, the stable value provider pays the shortfall to the insurer who, in turn, pays it to the policyholder. OCC 2004-56 at 16. In short, the stable value provider assumes some or all of the "price risk" -- but only upon policy surrender.

Conversely, while the policy is "in-force," SVAs primarily offer accounting benefits:

> To realize any economic benefit of the SVP contract, an institution would have to surrender the policy. Since policy surrender is nearly always an uneconomic decision, the SVP contract provides, in a practical sense, accounting benefits only.

OCC 2004-56 at 17-18. Because fair market value fluctuates, separate account BOLI policies can trigger "income statement volatility" when the policyholder reports the BOLI policy's fair market value in its financial statements. Stable value agreements, however, "ensure that the amount that an institution could realize from its separate account policy, in most circumstances, remains at or above the cost basis," OCC 2004-56 at 17, allowing the policyholder to report a "book value" for the BOLI policy. *Metro. Life Ins. Co. v. Bancorp Services, L.L.C.*, 527 F.3d 1330, 1332-33 (Fed. Cir. 2008).

In short, a policyholder's "price risk" protection arises if the policy is surrendered, an event which has yet to occur in BB&T's case. More importantly, an SVA's provisions, such as the "Reallocation Event" provisions here, *protect the stable value provider* (not the policyholder) against the price risk it assumed under the SVA.

B. Overview of the BB&T Transaction

Plaintiff, a Delaware trust, purchased a MassMutual BOLI policy ("Policy") in August 2006. [First Amended Complaint ("FAC") ¶¶ 1-2, 15, 18]. BB&T purchased the Policy based on a recommendation from Clark, a Delaware corporation. [*Id.* ¶¶ 17, 35-36]. Clark provided BB&T with MassMutual's Confidential Private Placement Memorandum No. 79 dated June 1, 2006 ("PPM") which, according to BB&T, "set out the terms of the BOLI product that MassMutual was offering to sell to BB&T." [*Id.* ¶¶ 36-37]. A copy of the PPM (without its voluminous appendices) is Exhibit B to MassMutual's motion.

BB&T elected the "Stable Value Endorsement," under which, according to BB&T, the BOLI premiums received the "benefits and protection of" MassMutual's SVA with Bank of America ("BOA"). [*Id.* ¶ 41]. According to the Amended Complaint, if BB&T surrenders the Policy, BOA pays any difference between the underlying net investment value and the book value. [*Id.* ¶ 28].

1. Alleged Reallocation Events

BB&T claims MassMutual was required to liquidate BB&T's Falcon investment if a "Reallocation Event," as defined in the SVA, occurred. [*Id.* ¶¶ 49, 53]. Whether a Reallocation Event occurred involves complicated calculations regarding the Falcon Fund's performance at various points in time. [*Id.* ¶ 48].

BB&T claims MassMutual failed to liquidate the Falcon investment after Reallocation Events occurred in both August and November 2007. [*Id.* ¶¶ 53, 57, 61, 62, 70]. BB&T also claims Defendants misrepresented that no Reallocation Event occurred in August 2007. [*Id.* ¶¶ 59, 69].

2. Critical Issues Arising Under Transaction Documents

Several transaction documents outline important details BB&T glosses over. These include (1) the PPM (Exhibit B), (2) the Policy and stable value endorsement ("Endorsement") (a copy of the specimen policy is Exhibit C; a copy of the Endorsement is Exhibit D to MassMutual's motion), (3) an August 16, 2006 Letter Agreement (the "Letter Agreement") (Exhibit E to MassMutual's motion), (4) the SVA (Exhibit F to MassMutual's motion), and (5) Appendix B to the PPM (Exhibit G to MassMutual's motion) which summarizes key provisions of the SVA.

Each of these documents is integral to, and referenced in, the Amended Complaint. Indeed, BB&T claims the key contract terms are "set out" in three of those documents (the PPM,

Policy, and Letter Agreement). [FAC ¶ 123].[3] Consequently, the Court can properly consider these documents for purposes of this motion to dismiss.

Critically, *none* of the alleged contractual documents to which BB&T is a party contains any operative "Reallocation Event" provisions. Instead, certain of these documents simply *describe* the SVA's Reallocation Event provisions.

Nor do the alleged contractual documents give BB&T a right to enforce BOA's rights under the SVA's Reallocation Event provisions. Instead, the SVA says BOA could unilaterally waive those provisions [Exh. F at 33] and, further, that there are no third party beneficiaries of the SVA [*id*. at 25]. Thus, BB&T seeks to enforce contractual rights it does not have, those belonging to BOA as set forth in a contract to which BB&T was neither a party nor a third party beneficiary.

3. Disclosure of Separate Account Structure and "Price Risk"

The PPM described for BB&T how MassMutual owns the funds in the Separate Account and how the Separate Account addresses credit risk. [Exh. B at 4; *see also* Exh. C at 8]. The general investment structure was also disclosed, including the opportunity for BB&T to allocate its premiums to "Stable Value Divisions." [Exh. B at 8-9; Exh. C at 7]. And BB&T was advised that the cash surrender value would fluctuate with the separate account's investment experience with "no minimum guarantees," so BB&T's "ultimate risk" was the "complete loss" of the Policy's value. [Exh. B at 1; *see also* Exh. D at 1].

Contrary to its allegations of having to blindly rely on Defendants' representations, BB&T represented it understood the risks inherent in the BOLI Policy. [Exh. B at 1]. BB&T also represented it "can bear the economic risk of losing [its] entire ownership interest in the

[3] It is debatable whether the PPM is a "contractual" document. However, for purposes of this motion only MassMutual will assume that the PPM comprises part of the contract with BB&T.

Policy" and had "substantial experience in making insurance and investment decisions of this type." [*Id.* at 2]. BB&T was advised to consult with "its own legal counsel, accountant, tax experts and other advisors as to the legal, economic, tax and related matters concerning its purchase of the Policy." [*Id.* at 1].

4. Notices and Disclosures Regarding The SVA

In addition to disclosures about price risk, the PPM also disclosed key details about the SVA. First, the PPM advised BB&T of its right to request a stable value endorsement. [Exh. B at 9]. That same section disclosed that the stable value feature would result in significant restrictions, including restrictions on withdrawals. [*Id.*; *see also* similar notices at *id.* at 8, 10, 12, 13, 15 and 17]. And, BB&T was advised, *repeatedly*, to carefully review all of the SVA documents. [*Id*. at 9; *see also id.* at 1, 5, 8, 10, 12, 13, 15, 17].

The PPM's Appendix B more fully described the SVA. It described two "subaccounts" available under the SVA as (1) the Bank Dedicated Diversified Fund Subaccount and (2) the Fixed Income Subaccounts. Appendix B disclosed that the Bank Dedicated Diversified Fund would be invested in Falcon Strategies LLC, Portfolio M. [Exh. G at 2]. BB&T elected to place 50% of its premium into the Falcon Fund subaccount. [FAC ¶¶ 3, 43].

The Summary further outlined that funds would be reallocated out of Falcon if a "Reallocation Event" occurred. [Exh. G at 3]. Importantly, however, the Summary noted that BOA could unilaterally waive a Reallocation Event: "Each of the following will be a Reallocation Event under the Stable Value Agreement *unless otherwise elected by the Stable Value Provider . . . .*" [*Id.* at 7 (emphasis added)]. Critically, the Summary also confirmed that the SVA would not create any third party beneficiary rights. [*Id.* at 1].

5. Key SVA Provisions

Several SVA provisions are critical. First, the SVA explicitly states that BB&T is not a third party beneficiary of the SVA:

> The terms of the Agreement are intended solely for the benefit of the Issuer and the Carrier and their respective successors and permitted assigns and it is not the intention of the Issuer or the Carrier to confer third-party beneficiary rights upon any other person or entity.

[Exh. F at 25].

Next, the SVA outlines the key "price risk" protection BOA agreed to provide. Specifically, BOA's financial responsibilities were triggered if, on the "Maturity Date," the "Investment Value" exceeded the actual Portfolio Market Value:

> If the Agreement terminates on the Maturity Date and, as of the close of business on the Business Day immediately preceding the Maturity Date, the Investment Value exceeds the Stable Value Portfolio Market Value, then, no later than two (2) Business Days following the Maturity Date, the Issuer shall pay to the Carrier, on behalf of the Separate Account, an amount equal to such excess and the Carrier, on behalf of the Separate Account, shall pay to the Issuer an amount equal to the sum of any accrued Stable Value Fee and Partial Withdrawal Fee unpaid as of the Maturity Date.

[*Id.* at 14; *see also* Exh. G at 1]. Conversely, BOA had no obligation if the Portfolio Market Value exceeded the Investment Value. [Exh. F at 14].

The SVA carefully defines what triggers a "Reallocation Event." [*Id.* at 33]. For example, a Reallocation Event could occur if "the one (1)- year annualized standard deviation of the return on Units of the Bank Dedicated Diversified Fund Subaccount recorded to the Stable Value Portfolio exceed[ed] 10%" [*id.*], and, in fact, BB&T claims such a Reallocation Event occurred in August 2007. [FAC ¶¶ 52-53]. Another way a Reallocation Event could occur is if the "BDD Subaccount Market Value (adjusted for cash flows) on any day [was] less than the BDD Subaccount Market Value on the last day of the immediately preceding calendar month by

7% or more." [Exh. F at 33]. BB&T also alleges that such a Reallocation Event occurred in November 2007. [FAC ¶¶ 60-61].

However, BB&T ignores that the SVA expressly gives BOA (referred to as the "Issuer") the right to waive a Reallocation Event:

> [T]he Issuer may elect, by providing written notice to the Carrier, that the occurrence of any of the events or conditions described in clauses (i) through (vii) (inclusive) immediately above shall not give rise to a Reallocation Event.

[Exh. F at 33].

6. Important Timing Restrictions On Reallocations

Even if BB&T had a viable breach of contract claim, any claims for damages before December 31, 2007 should be dismissed based on various timing restrictions on reallocations. [*See* FAC ¶ 60 (alleging 7% decline in November 2007)]. SVA Section 2, for example, states:

> Stable Value Assets Management after Reallocation Event. If a Reallocation Event occurs, then the Carrier shall cause the Stable Value Assets to consist solely of cash and Units of the Fixed Income Subaccounts *as soon as practicable, but no later than the twenty-fifth (25th) day, following the last day of the calendar quarter that next follows by at least sixty (60) days the date of the occurrence of such Reallocation Event*.

[Exh. F at 3 (emphasis added)].

BB&T tries to sidestep the SVA's restrictions by claiming a liquidation had to be accomplished "as quickly as possible." [FAC ¶ 50]. But BB&T ignores important other contractual provisions that set mandatory time frames.

Section 8 of the Stable Value Endorsement, for example, states:

> Advance Notice. Transfers, loans, and partial withdrawals from the Falcon Strategies Division will be released on or after the last day of the calendar quarter that next follows by at least sixty (60)-days Our receipt of Your written request for such transaction. For a total surrender of the group policy and certificates with account value allocated to the Falcon Strategies Division, We require a

> minimum of sixty (60)-days advance written notice advising Us of the surrender notice date upon which the owner intends to submit its written request for a full surrender of all of the certificates.

[Exh. D at 4]. The same approach applies to a "full surrender," where the distribution will be based on an "effective date" which is "the last day of the calendar quarter that next follows by at least sixty (60)-days Our receipt of notice of the surrender election." [*Id.* at 5].

Consequently, even if a Reallocation Event occurred in August 2007, BB&T could not have avoided the alleged declines in market value in the Falcon Fund in November of 2007. Instead, the earliest opportunity to reallocate would have been December 31, 2007, foreclosing any claims for damages based on any prior market value losses.

III. ARGUMENT

A. Standard of Review

While the court should accept as true BB&T's well-pled factual allegations, the Court need *not* "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *Strickland v. Hedrick*, ___ N.C. App. ___, 669 S.E.2d 61, 73 (2008). Nor should the Court accept legal conclusions as true. *Miller v. Rose*, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000).

Further, the Court "may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant" without converting the motion to one for summary judgment. *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007). Each of the exhibits MassMutual filed with this motion fall within this rule. [*See* FAC ¶¶ 37 (referencing the SVA) and 123 (referring to PPM, Policy, and Letter Agreement as alleged contractual documents)]. Importantly, the Court need not accept as true allegations in the Amended Complaint that are contradicted by the documents attached to MassMutual's motion to

dismiss. *Crockett Capital Corp. v. Inland American Winston Hotels, Inc.*, No. 08 CVS 000691, 2009 WL 649158, at *6 (N.C. Super. Mar. 13, 2009) (Tennille, J.).

B. Choice of Law

1. Delaware Law Applies to BB&T's Tort Claims

North Carolina follows the *lex loci delecti* approach which applies the law of the situs of the claim. *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 854 (1988). The "situs" of a tort claim is the state where the injury occurred. *Id.*; *see also Stetsor v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 14-15, 598 S.E.2d 570, 580 (2004).

BB&T is a *Delaware* trust with its principal place of business in *Delaware*. [FAC ¶ 15]. Despite BB&T's allegations of misrepresentations made, and lives insured, in North Carolina [*see, e.g.*, FAC ¶¶ 1, 36, 40-41, 44, 85-86], North Carolina law is clear: Delaware law applies to the tort claims because BB&T's alleged injury occurred in Delaware. *See e.g., N.C. Mutual Life Ins. Co. v. McKinley Fin. Serv., Inc.*, 386 F. Supp. 2d 648, 658 (M.D.N.C. 2005) (although tortious conduct likely occurred in North Carolina, Florida law applied because the damages were suffered there); *Rhone-Poulenc Agro S.A. v. Monsanto Co.*, 73 F. Supp. 2d 554, 555 (M.D.N.C. 1993) (for fraud claims, the place of the wrong is where the loss is sustained, not where the misrepresentations were made); Restatement (First) of Conflict of Laws § 377 Note 4 (same).

Likewise, BB&T's allegations that Branch Banking & Trust Company, the Grantor of BB&T ("Branch"), suffered damages in North Carolina [FAC ¶¶ 36, 65, 87] are irrelevant. First, these allegations are mere conclusions of law that the Court need not accept. But more importantly, there is no basis for the Court to ignore the legal distinction between the Trust and its grantor. 12 Del. C. § 3801(g) ("Any such association heretofore or hereafter organized shall be a statutory trust and a separate legal entity."). Branch, a sophisticated financial institution,

made a strategic decision to form a Delaware trust (a separate legal entity) to own the BOLI Policy. BB&T cannot simply ignore the consequences of this decision because it suits its litigation strategy. Instead, Delaware law applies because a Delaware Trust (and not its North Carolina grantor) incurred the alleged damages.

2. Delaware and/or New York Law Applies to Plaintiff's Breach of Contract Claim

BB&T claims the "contract" consists of "the PPM, the BOLI policy, the August 16, 2006 Letter Agreement, and certain other undefined representations, understandings and agreements between the parties." [FAC ¶ 123]. Contract claims are governed by the law of the state where the contract was made. *Tanglewood Land Co., Inc. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980).

Further, the parties' choice of law provisions "will be given effect." *Id.*; *Cable Tel. Svcs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 642, 574 S.E.2d 31, 33 (2002). For insurance policies, courts apply the law of the state where the policy was "delivered." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000).[4]

Here, the Policy and the Letter Agreement (a) contain choice of law provisions selecting Delaware law, and (b) confirm that the Policy was "delivered" in Delaware. [*See* Exh. C at 1; Exh. E at 1, 7]. Thus, Delaware law governs any contract claim arising under the Policy and Letter Agreement.

The SVA contains a New York choice of law provision. [Exh. F at 24]. Consequently, New York law applies in determining whether BB&T has any rights under the SVA (which it does not).

[4] N.C. Gen. Stat. § 58-3-1 and *Collins & Aikman Corp. v. Hartford Accident & Indem. Co.*, 335 N.C. 91, 94, 436 S.E.2d 243, 245 (1993), do not apply here because the policy was issued by a Massachusetts resident to a Delaware resident.

3. Delaware Law Applies to BB&T's Unfair Trade Practices Act Claim

BB&T's Unfair and Deceptive Trade Practices Act claim is "neither wholly tortious nor wholly contractual in nature." *Stetsor*, 165 N.C. App. at 15, 598 S.E.2d at 580. For choice of law purposes, some North Carolina courts use a "significant relationship" test while others use the "place of the injury" rule. *Compare Andrew Jackson Sales v. Bi-Lo Stores*, 68 N.C. App. 222, 225, 314 S.E.2d 797, 799 (1984), *with United Virginia Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 320, 339 S.E.2d 90, 93 (1993). But Delaware law applies under either test.

Again, the Trust's alleged injuries were sustained in Delaware. And Delaware has the most significant relationship to this cause of action: the plaintiff is a Delaware business trust [FAC ¶ 15], Clark is a Delaware corporation [*id.* ¶ 17], the Policy was "delivered" in Delaware [Exh. C at 1; Exh. E at 1], and any alleged economic harm occurred in Delaware. Although BB&T asserts tort claims based on various communications allegedly occurring in North Carolina [FAC ¶¶ 85-86], these allegations do not change the choice of law analysis. BB&T's alleged harm was caused by MassMutual's alleged breach of contract, and thus the negotiations and representations that occurred *prior* to the execution of the contract are not relevant. Instead, the parties' relationship was centered in Delaware where the Policy was entered into and delivered. *See, e.g., Santana, Inc. v. Levi Strauss & Co.*, 674 F.2d 269, 274 (4th Cir. 1982) (finding the state where the original contract was entered into had the most significant relationship and the contacts with other states merely incidental). Therefore, this Court should apply Delaware law to BB&T's UDTPA claim.

C. Each of BB&T's Tort Claims Fail To State A Claim Against MassMutual

1. Counts I, II, III, IV, and VI are Impermissible Attempts to State a Cause of Action in Tort for a Breach of Contract Claim

BB&T claims MassMutual failed to monitor the premiums invested in the Falcon Fund and advise BB&T of its rights and obligations under the BOLI Policy—obligations, as pleaded by BB&T, imposed by the contract between the parties. [FAC ¶¶ 46-48, 57, 62]. Yet BB&T improperly attempts to transform this breach of contract dispute into a tort action, an approach Delaware law rejects.

Delaware courts routinely dismiss tort claims that simply restate breach of contract claims.[5] "As a general rule, it is . . . clear . . . that where the action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of some duty imposed by law, an action on the case will not lie, and the plaintiff must sue, if at all, in contract." *Garber v. Whittaker*, 174 A. 34, 36 (Del. Super. Ct. 1934). As such, "[a breach of contract claim] cannot be 'bootstrapped' into a fraud claim merely by adding the words 'fraudulently induced' or alleging that the contracting parties never intended to perform." *Pinkert v. Olivieri, P.A.*, No. Civ. A. 99-380-SLR, 2001 WL 641737, at *5 (D. Del. May 24, 2001) (citation omitted).

Here, MassMutual's alleged duties arose solely from the parties' contractual relationship, not as a matter of social policy or tort law. [*See, e.g.*, FAC ¶¶ 49, 53-54, 56-57 (alleging that MassMutual was "obligated" under the PPM to either liquidate the Falcon Fund or alternatively

[5] North Carolina law also strictly enforces the distinction between actions in tort and contract. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345-47 (4th Cir. 1998).

advise BB&T of its elective reallocation rights); *id.* ¶¶ 71-72, 76 (alleging that the stable value provisions in the PPM "obligated" MassMutual to monitor the Falcon Fund to detect whether a Reallocation Event occurred)]. Thus, BB&T's remedy, if any, is an action sounding in contract, not in tort.

Indeed, BB&T's tort counts mirror its breach of contract count. According to BB&T:

- "The contract required MassMutual to administer and monitor the BB&T TRUST BOLI policy and investment according to the contract documents and its duty of good faith and fair dealing and in the best interests of BB&T Trust. Among other things, the contract required MassMutual to monitor the performance of the Falcon investment in a manner that would enable MassMutual to detect the triggering of a Reallocation Event as soon as it occurred, and to immediately report that triggering event to both BB&T TRUST and Bank of America."

- "MassMutual breached the contract by failing to administer and monitor the BB&T TRUST BOLI policy and investment in accordance with the contract documents and its duty of good faith and fair dealing, and in the best interests of BB&T TRUST. Among other things, MassMutual failed to timely report to BB&T TRUST and to Bank of America that a Reallocation Trigger had been hit in August 2007 and in November 2007, and to take the actions required to preserve the value of BB&T TRUST's premiums paid for the BOLI investment."

[*Id.* ¶¶ 125-126]. Yet these exact alleged actions also form the basis for BB&T's breach of fiduciary duty and negligence counts. [*See id.* ¶¶ 95, 99 (alleging that MassMutual breached its fiduciary duty to BB&T, by "failing to properly and timely monitor and report . . . the performance of BB&T TRUST's investment" and failing to timely advise BB&T of "its rights and protections given the performance of that investment"); *id.* ¶ 110-111(same)]. BB&T's attempt to "bootstrap" MassMutual's contractual duties into tort claims should be rejected. *Pinkert*, 2001 WL 641737, at *5.

2. The Economic Loss Doctrine Precludes BB&T's Negligence Claims (Counts III and IV)

The economic loss rule bars BB&T's negligence and negligent misrepresentation claims. BB&T may not recover in negligence for losses without bodily harm or property damage. *See Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1195, 1200 (Del. 1992); *Brasby v. Morris*, No. C.A. 05C-10-022-RFS, 2007 WL 949485, at *6-7 (Del. Super. Ct. Mar. 29, 2007) (unpub.).

Unlike North Carolina law, Delaware law does not limit the economic loss doctrine to product liability actions; instead, the doctrine applies "to any kind of dispute arising from a commercial transaction where the alleged damages do no harm to person or to property other than the bargained for item." *Christiana Marine Service Corp. v. Texaco Fuel & Marine Marketing*, No. Civ.A. 98-C-02-217WCC, 2002 WL 1335360, at *5 (Del. Super. Ct. June 13, 2002) (unpub.); *see also McKenna v. Terminex Int'l Co.*, No. 04C-02-022RBY, 2006 WL 1229674, at *2 (Del. Super. Ct. Mar. 13, 2006). Here, the Court should dismiss Counts III and IV because they both unquestionably seek relief for purely economic damages.[6]

3. Counts I and II Fail to State a Claim Because MassMutual and Clark Are Not BB&T's Fiduciaries

Contrary to Count I, MassMutual has no fiduciary relationship to BB&T under Delaware law. The Delaware Supreme Court analyzed this issue in the context of Corporate Owned Life Insurance (or "COLI") in *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 (Del. 2006). As the Court noted, "[i]t is settled law that the relationship between an insurer and an insured generally is not fiduciary in character." *Id.* at 114; *see also Crosse v. BCBSD, Inc.*, 836 A.2d 492 (Del. 2003) (insurance contract does not create a fiduciary relationship); *Corrado*

[6] The limited exception to the economic loss doctrine under Section 552 of the Restatement (Second) of Torts, *see Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378 (Del. Super. Ct. 1990), is inapplicable here because (1) MassMutual did not supply information for BB&T's use in business transactions with third parties, and (2) MassMutual is not in the business of supplying information. *Id.* at 1383; *Christiana Marine Service Corp.*, 2002 WL 1335360, at *7.

Bros., Inc v. Twin City Fire Ins. Co., 562 A.2d 1188, 1192 (Del. 1989). Therefore, BB&T's breach of fiduciary duty claim should be dismissed.

BB&T pleads that MassMutual was a fiduciary because MassMutual "undertook a far broader duty to BB&T than simply that of an insurer" by providing "an entire investment package" to BB&T. [FAC ¶ 90]. BB&T further alleges that MassMutual's interests were aligned with BB&T's because MassMutual was entitled to commissions and sharing in investment returns. Here, the plain language of the contract belies BB&T's claim that the relationship between BB&T and MassMutual was anything other than a typical, arms-length commercial relationship. [*See, e.g.*, Exh. B at 1-2].

While BB&T tries to avoid this conclusion (by repeatedly referring to the Policy as an investment), there is no disputing that this case involves a life insurance policy and not an investment management contract. Even a cursory review of the relevant documents confirms that the parties repeatedly emphasized that this was a life insurance transaction. [*See, e.g.*, Exh. B at 1, 2 (describing the Group Flexible Premium Variable Adjustable Life Insurance policy), 3 ("A purchase of the Policy is suitable only for entities of substantial financial means."), 4 (discussing state regulation of life insurance), 5 (describing general provisions of the Policy); Exh. E at 1 (stating that BB&T executed and delivered an application for the purchase of individual certificates issued under a group flexible variable life insurance policy); Exh. C].

Further, the Delaware Supreme Court has already addressed, and rejected, the identical argument in *Wal-Mart*. 901 A.2d at 114; *see also Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 628 (Del. Ch. 2005) ("[T]he court is unwilling to infer . . . that Wal-Mart, one of the largest, most sophisticated companies in the world, advised by its own professionals, so 'depended' on the broker-defendants as to invoke this court's equitable powers to regulate

relationships between fiduciaries and their *cestui que trusts*."). BB&T's claim should meet the same fate.

BB&T's aiding and abetting claim (Count II) should also be dismissed. To adequately state a claim for aiding and abetting breach of fiduciary duty against MassMutual, BB&T must have a fiduciary relationship with Clark. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 172 (Del. 2002). However, as stated in Clark's motion to dismiss, Clark did not owe BB&T any fiduciary duties. As such, there is nothing for MassMutual to aid and abet.

D. BB&T Fails To State A Claim Against MassMutual for Breach of Contract (Count V)

BB&T's contract claim fails because (a) BB&T cannot enforce the Reallocation Event provisions of the SVA (as a non-party and non-third party beneficiary); (b) none of the alleged contractual documents to which BB&T was a party contain any operative, mandatory Reallocation Event provisions (instead, at most, they merely describe the Reallocation Event provisions of the SVA); and (c) BB&T relies on non-existent notice obligations.

1. BB&T Has No Contractual Right To Enforce Provisions of The SVA

Because it is not a party to the SVA, BB&T could only rely on the SVA's "Reallocation Event" provisions if it is a third party beneficiary. But regardless of any incidental benefits BB&T may receive from the SVA, BB&T cannot be a third party beneficiary under either Delaware or New York law, unless the parties to the SVA actually intended to confer such status. *Guardian Constr. Co.*, 583 A.2d at 1386; *Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531, 534 (Del. Super. Ct. 1990); *Port Chester Electric Constr. Co. v. Atlas*, 357 N.E.2d 983, 986 (N.Y. 1976). Moreover, under both Delaware and New York law, contractual provisions expressly disclaiming the existence of any third party beneficiaries are given effect. *See, e.g.*, *Kronenberg v. Katz*, 872 A.2d 568, 605-06 (Del. Ch. 2004); *Kaback Enter., Inc. v. Time, Inc.*,

813 N.Y.S.2d 54, 55 (N.Y. App. Div. 2006); *Bd. of Managers of Alexandria Condo. v. Broadway/72nd Assocs.*, 729 N.Y.S.2d 16, 18 (N.Y. App. Div. 2001); 28 N.Y. Prac., Contract Law § 8:9.10.

Trying to sidestep its lack of standing, BB&T attempts to align its interests with BOA [FAC ¶ 31] and implies that MassMutual's alleged failure to advise BOA of a Reallocation Event somehow gives BB&T a cause of action. [FAC ¶¶ 53-54]. BB&T's allegations are dubious: again, the Reallocation Event provisions protect BOA (not BB&T) against the price risk BOA assumed. It is therefore not surprising that BOA has the right to waive a Reallocation Event and the SVA disclaims third party beneficiaries. BB&T simply has no right to enforce BOA's rights under the SVA.

Despite BB&T's creative legal theories and artful pleading, the SVA's "no third party beneficiary" provision is controlling. *Crockett Capital*, 2009 WL 649158, at *6 (court need not accept allegations in complaint that are at odds with actual contracts). BB&T therefore cannot enforce the SVA's "Reallocation Event" provisions but must, instead, rely solely on contractual documents to which it is a party.

2. BB&T's Contractual Documents Create No Mandatory Reallocation Event Obligations

None of the alleged contractual documents to which BB&T is a party requires MassMutual to reallocate following a Reallocation Event. Nor can such an obligation be inferred under Delaware law.

The proper construction of any contract, including an insurance policy, is a question of law. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992). "Because Delaware adheres to the objective theory of contract interpretation, the court looks to the most objective indicia of that intent: the words found in the written instrument."

Sassano v. CIBC World Markets Corp., 948 A.2d 453, 462 (Del. Ch. 2008). Where the language of the contract is clear and unambiguous, its plain meaning controls. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001).

Further, courts should not imply obligations that do not appear in the contract if the express terms of the agreement do not suggest the omission of such an obligation. *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, No. C.A. 15388, 1997 WL 525873, at *5 (Del. Ch. Aug. 13, 1997) (unpub.). That is critical here because there are no operative reallocation provisions requiring a mandatory reallocation if a "Reallocation Event" occurs.

Instead, the PPM simply confirmed that BB&T could elect a stable value feature [Exh. B at 9], and that, if BB&T elected a stable value feature, MassMutual would enter into an SVA with a third party that would contain a "Reallocation Event" provision [Exh. G at 7]. Notably, even the description in the Summary specifies that BOA can waive a "Reallocation Event" and confirms that BB&T is not a third party beneficiary of the SVA. [*Id.*] The PPM simply does not require MassMutual to take any action if a "Reallocation Event" occurs; instead, any "Reallocation Event" obligations arise only under the SVA.

Nor do the Policy and Endorsement contain operative provisions regarding a "Reallocation Event." These documents, in fact, do not even refer explicitly to a "Reallocation Event."

Finally, BB&T turns to the Letter Agreement (which also never refers to a "Reallocation Event") and claims it obligated MassMutual to enforce the SVA's Reallocation Event provisions for BB&T's benefit. BB&T relies on a provision stating that MassMutual would use "reasonable efforts" to cause BOA to perform "its obligations." [FAC ¶ 46]. But the Reallocation Event provisions are not "obligations" owed by BOA (and especially not owed to BB&T which is

neither a party nor third party beneficiary of the SVA). Instead, the Reallocation Event provisions define BOA's "rights" (which it was free to waive).

Consequently, BB&T has no contractual right to enforce the Reallocation Event provisions in the SVA and has no contractual right arising from any provision in any documents to which BB&T was a party. BB&T's contract claim should therefore be dismissed.

3. Alleged Monitoring And Notice Obligations

BB&T alleges MassMutual breached alleged monitoring and notice obligations by failing to disclose an alleged Reallocation Event in August 2007. [FAC ¶¶ 21, 26, 30]. BB&T even claims these duties were owed to both BB&T and BOA because their interests were allegedly aligned. [FAC ¶¶ 31-32]. But the documents do not support BB&T's theories.

For example, the SVA contains detailed provisions outlining exactly what MassMutual's obligations were "to provide" BOA with certain "information and notices." [Exh. F at 17]. None of those provisions require MassMutual to perform calculations or render an opinion on possible Reallocation Events. Not surprisingly (as there are no third party beneficiaries), those provisions do not require MassMutual to render *any* report to BB&T. [Exh. F at 17-20].

Nor does the Group Policy impose any such reporting obligations. The Policy defines only limited reporting obligations for annual reports and "illustrative reports" at BB&T's request. [Exh. C at 21].

Notably, the parties separately negotiated an August 2006 Letter Agreement which contains a number of detailed provisions. But this Letter Agreement does not require MassMutual to render opinions about possible Reallocation Events. [Exh. E].

The Court should not impose obligations the contractual documents do not contain. *Cincinnati SMSA Ltd. P'ship*, 1997 WL 525873, at *5. This is especially true here where the parties are sophisticated commercial entities capable of negotiating their rights (as evidenced by

the separately negotiated Letter Agreement). There is simply no basis to hold MassMutual liable for breaching alleged obligations that do not exist.

4. Alternatively, BB&T Cannot Recover For Any Alleged Damages Sustained Before December 31, 2007

Finally, even if BB&T had some colorable contract claim, it cannot recover for any alleged "damages" sustained before December 31, 2007. Both the Stable Value Endorsement and the SVA confirm that no reallocation could occur until the last day of the calendar quarter that next follows by at least 60 days the date of the Reallocation Event. [Exh. D at 4 and 5; Exh. F at 3]. Again, while BB&T weakly alleges that a liquidation had to occur "as soon as possible" [FAC ¶ 50], its allegations are rebutted by the Stable Value Endorsement.

BB&T also resorts to sheer speculation about possible events that *might* have occurred had it received allegedly better notice about the Falcon Fund's performance. For example, BB&T theorizes that BOA might have achieved a "negotiated liquidation" under which the Falcon Strategies would have waived any waiting periods or advance notice requirements that would delay a liquidation. [FAC ¶¶ 54-55]. But BB&T must allege facts, not speculation or hypotheticals, to survive a motion to dismiss. *Strickland v. Hedrick*, ___ N.C. App. at ___, 669 S.E.2d at 73 (Court need *not* "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences"). The Court should not accept BB&T's speculative theories about actions third parties (BOA and Falcon) might have taken.

In short, if BB&T was correct that a Reallocation Event occurred in August 2007, then the last day of the calendar quarter that next follows by at least 60 days would be December 31, 2007. Consequently, BB&T has no claim to recover for alleged losses occurring in 2007.

E. BB&T's Unfair And Deceptive Trade Practices Act Claim Should Be Dismissed (Under Either Delaware or North Carolina Law)

1. Count VI Fails to State a Claim Under Delaware Law

BB&T's claim is premised on the North Carolina UDTPA, N.C. Gen. Stat. § 75-1.1. However, it is axiomatic that violation of a North Carolina statute is not a cause of action under Delaware law. Because Delaware law applies, Count VI should be dismissed.

2. Count VI Fails to State a Claim Under North Carolina Law

But even under North Carolina law, Count VI is legally deficient. Because of its treble damages provision, a UDTPA claim "constitutes a boilerplate claim in most every complaint based on a commercial or consumer transaction in North Carolina." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 347 (4th Cir. 1998). To "correct this tendency, and to keep control of the extraordinary damages" available under the UDTPA, such claims cannot be premised on a breach of contract (even an intentional breach) absent substantial aggravating circumstances. *Id.*; *see also Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 217, 646 S.E.2d 550, 558 (2007); *The Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323 (2006); *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992). While Count VI is superficially premised on MassMutual's allegedly tortious conduct, BB&T's tort claims are nothing more than re-cast breach of contract claims.

Nor has BB&T set forth substantial aggravating circumstances for a viable UDTPA claim. *See Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989); *Hageman v. Twin City Chrysler-Plymouth, Inc.*, 681 F. Supp. 303, 307 (M.D. N.C. 1988).

Moreover, the UDTPA does not reach the transaction at issue because BB&T is neither a traditional consumer nor a business in competition with MassMutual that the statute intended to protect. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 519-20 (4th Cir. 1999)

(finding no violation of the UDTPA because the misrepresentations did not harm the consuming public and the parties were not in competition).

IV. CONCLUSION

For the foregoing reasons, Massachusetts Mutual Life Insurance Company respectfully requests that this Court grant its Motion to Dismiss and dismiss Plaintiff's Amended Complaint with prejudice.

This the 11th day of September, 2009.

/s/ Michael L. Robinson
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CERTIFICATE OF COMPLIANCE WITH RULE 15.8

I, Michael L. Robinson, certify that the foregoing **BRIEF OF DEFENDANT MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY IN SUPPORT OF ITS MOTION TO DISMISS** complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

/s/ Michael L. Robinson
Michael L. Robinson (N.C. Bar No. 9438)

CERTIFICATE OF SERVICE

The undersigned, as counsel for Defendant Massachusetts Mutual Life Insurance Company, hereby certifies that, on September 11, 2009 he served the foregoing document upon counsel for Plaintiff and Defendant Clark Consulting by email transmission as stipulated by the parties, to the following individuals:

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