NORTH CAROLINA

FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS-4007

BB&T BOLI PLAN TRUST,

Plaintiff,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and CLARK CONSULTING, INC.,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANT MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

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## I. INTRODUCTION

BB&T Trust's complaint cannot be dismissed unless "it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." With one exception, MassMutual relies exclusively on Delaware law to argue that this certainty exists. However, the choice-of-law factors in this misrepresentation-based lawsuit require application of North Carolina law: the misrepresentations occurred, and the damages were incurred, in North Carolina. Indeed, N.C. Gen. Stat. §58-3-1 requires that a policy insuring lives in North Carolina – as the policy at issue here does – be governed by North Carolina law. Accordingly, MassMutual's motion to dismiss based on Delaware law must be denied.

But even under Delaware law, BB&T Trust has satisfied the liberal 12(b)(6) pleading standard. Through almost 40 pages of detailed factual allegations, BB&T Trust's complaint shows that MassMutual had the duty to monitor the investment it had made on behalf of BB&T Trust and to report any relevant information concerning that investment to BB&T Trust in a timely and accurate manner. Indeed, the defendants knew and intended that BB&T Trust was precluded by federal tax laws from interacting – either directly or indirectly – with the investment manager. Accordingly, they knew that BB&T Trust was entirely dependent upon MassMutual and Clark to monitor the investment, inform BB&T Trust, and take action to protect the investment. The complaint also alleges in detail exactly how MassMutual breached that duty – how MassMutual failed to notify BB&T Trust of the occurrence of two "triggering" events, and how MassMutual failed to take any action to liquidate that investment as those

"triggering" events required. Given these detailed allegations, there is certainly a "state of facts which could be proved in support of the claim."

## II. FACTUAL BACKGROUND

### A. PLAINTIFF'S BOLI POLICY

#### 1. The Basic Structure of the BOLI Investment

On August 16, 2006, BB&T Trust purchased a Bank Owned Life Insurance ("BOLI") policy from Defendant Massachusetts Mutual Life Insurance Company ("MassMutual"). *See* First Amended Complaint and Jury Demand ("FAC") ¶ 40. The BOLI policy is both a life insurance policy, which insures the lives of a substantial number of people who live and work in North Carolina,[1] and an investment vehicle. The structure, requirements and guidelines for the BOLI policy/investment were detailed in a Private Placement Memorandum issued by MassMutual and dated June 1, 2006 (the "PPM"), which Clark Consulting, Inc. ("Clark") provided to BB&T Trust.

According to the PPM, MassMutual was required to take the premium that BB&T Trust paid to MassMutual – more than $112 million – and invest it in a "Separate Account" that MassMutual maintained for the benefit of BB&T Trust. FAC ¶ 90. The Separate Account was comprised of one or more "Divisions." PPM, p. 8 [EXH A hereto]. In short, the value of the BOLI policy/investment increased or decreased in accordance with the performance of the Separate Account. PPM, p. 1 [EXH A hereto]. And BB&T Trust was entitled to surrender the BOLI policy at any time and receive the value of the Separate Account. PPM, p. 12 [EXH A hereto].

[1] FAC ¶¶ 1, 44.

2. **No Direct or Indirect Control by BB&T Trust**

As with any other life insurance policy, any death-benefit payments made to BB&T Trust under the BOLI policy were intended to be tax free. PPM, p. 18 [EXH A hereto]. In addition, gains in the value of the Separate Account were intended to be tax deferred. PPM, p. 20 [EXH A hereto]. However, to obtain this tax benefit, the policy owner (BB&T Trust) was precluded from exercising control over the investment:

> In regard to the control of separate account assets, any arrangement involving a separate account which leaves the policy owner in the same position it would be in without the separate account will not enable the policy owner to defer recognition of income in the separate account. . . . Where an independent investment adviser is appointed *without direct or indirect participation by the policy owner*, the investor control question does not arise. Activity by a policy owner with respect to the engagement of an independent investment adviser provides a basis for an IRS challenge of 'investor control.'

PPM, p. 20 (emphasis added) [EXH A hereto]. Thus, MassMutual and Clark both knew and intended that BB&T Trust would not exercise any control, *direct or indirect*, over the investment or the investment adviser.

3. **The Stable Value Feature**

BB&T Trust selected the Stable Value Division for its Separate Account. FAC ¶41. Appendix B to the PPM describes the conditions, restrictions and requirements of the Stable Value Division. PPM, p. 8 [EXH A hereto]. BB&T Trust's investments within this Division are referred to as its Stable Value Portfolio. PPM Appendix B, p. 1 [EXH A hereto]. BB&T Trust elected to have approximately half of its Stable Value Portfolio allocated to the Falcon Strategies, LLC fund ("Falcon"). FAC ¶ 43. The benefit of the Stable Value Feature of BB&T Trust's BOLI policy was that the Stable Value Provider (Bank of America) essentially guaranteed a portion (approximately 15%) of the Stable Value Portfolio against losses that BB&T Trust might incur on the Falcon

investment. PPM App. B, pp. 4-7 [EXH A hereto]. This "guarantee" was documented in a Stable Value Agreement ("SVA") between MassMutual and Bank of America that was included within the PPM. PPM App. D [EXH A hereto].

There were a number of circumstances under which MassMutual had the authority to buy and sell assets within BB&T Trust's Stable Value Portfolio. First, any time a death-benefit payment was made, MassMutual could sell assets to fund that payment. PPM App. B, p. 5 [EXH A hereto]. Second, MassMutual could sell assets to fund payment of applicable charges and expenses. PPM App. B, p. 5 [EXH A hereto]. Third, if a Reallocation Event occurred, BB&T Trust's Stable Value Portfolio was required to "consist solely of cash and units of the Fixed Income Subaccounts." PPM App. B, p. 3 [EXH A hereto]. Since the Falcon fund was not one of the Fixed Income Subaccounts,[2] a Reallocation Event would require that MassMutual sell the Falcon fund investment and reinvest the proceeds in either cash or units of the Fixed Income Subaccounts. PPM App. B, p. 3 [EXH A hereto].

**B. DEFENDANTS' BREACHES OF DUTY**

1. **The August 2007 Reallocation Event**

In August 2007, the Falcon fund's financial performance was sufficiently poor to satisfy one of the Reallocation Event "triggers". FAC ¶¶ 52-53. Yet not only did MassMutual and Clark not notify BB&T Trust that such a trigger had been hit, they affirmatively represented to BB&T Trust that no triggers had been hit. FAC ¶ 59.

2. **The November 2007 Reallocation Event**

In November 2007, the Falcon fund's financial performance was again bad enough to satisfy one of the Reallocation Event "triggers." FAC ¶¶ 60-61. And again,

[2] PPM App. B, p. 2 [EXH A hereto].

both MassMutual and Clark failed to timely report to BB&T Trust that a Reallocation Event trigger had been hit. FAC ¶ 72.

### 3. The Reallocation Events Required that the Falcon Investment be Liquidated as Soon as "Practicable"

The triggering events in August and November 2007 meant that a Reallocation Event had occurred. PPM App. B., p. 7 [EXH A hereto]. And the Stable Value Provider did not elect otherwise. FAC ¶¶ 53, 61. Accordingly, MassMutual was required to liquidate the Falcon investment. PPM App. B, p. 3 [EXH A hereto] ("If a Reallocation Event occurs, the Stable Value Portfolio must consist solely of cash and units of the Fixed Income Subaccounts," which did not include Falcon). But MassMutual failed to take any action to liquidate the Falcon investment. FAC ¶¶ 67-70.

In an August 16, 2006 letter agreement between BB&T Trust and MassMutual (the "Letter Agreement"), MassMutual agreed to cause Bank of America to fulfill its obligations under the SVA. Letter Agreement, p. 4 ¶ 9 [EXH B hereto]. By implication, MassMutual also agreed to comply with its own obligations under the SVA, since MassMutual could not require Bank of America to comply with its SVA obligations if MassMutual was in breach of the SVA. One of MassMutual's obligations under the SVA was that it would liquidate the Falcon investment as soon as practicable after a Reallocation Event. PPM App. D, p. 3 §2(C) [EXH A hereto].

## C. BB&T TRUST'S RELIANCE AND DAMAGES

Due to the "investor control" limitations on the BOLI investment described above, both MassMutual and Clark knew that BB&T Trust was entirely dependent upon MassMutual and Clark to monitor and report, in a timely and accurate manner, any

information relevant to the Falcon investment.[3] When MassMutual and Clark falsely represented that no Reallocation Event trigger had been hit in August 2007, and when they failed to timely report that a trigger had been hit in November 2007, BB&T Trust relied on those representations by failing to take action to ensure that the Falcon investment was liquidated as quickly as practicable, as was required by the PPM. FAC ¶ 76. In addition, BB&T Trust also had substantial leverage to negotiate a rapid liquidation in which waiting and notice periods could be waived. FAC ¶ 102. As shown above, BB&T Trust could surrender the BOLI policy at any time and thereby both protect itself from further losses and require Bank of America to pay the amount of losses that it had "guaranteed" under the SVA. PPM, p. 12; PPM App. B, pp. 4-7 [EXH A hereto]. Timely liquidation would have avoided some or all of the losses incurred on the Falcon investment. FAC ¶ 102.

## III. ARGUMENT

### A. NORTH CAROLINA LAW APPLIES TO PLAINTIFF'S CLAIMS AGAINST MASSMUTUAL

#### 1. North Carolina Law Applies to Plaintiff's Tort Claims

For most torts, North Carolina courts apply the traditional *lex loci delicti* standard for determining the applicable substantive law. For UDTPA claims, the North Carolina courts of appeal are split as to whether to apply the *lex loci delicti* standard or the "most significant relationship" standard. The North Carolina Supreme Court has not resolved this split, but federal courts in the Fourth Circuit apply the "most significant relationship"

[3] Indeed, BB&T Trust had numerous rights that required that it be kept informed concerning the performance of the Falcon investment. For example, BB&T Trust had the right to reallocate up to 25% of its Falcon investment into another investment per calendar quarter. PPM App. B, p. 3 [EXH A hereto]. And BB&T Trust could surrender the investment at any point. PPM, p. 12 [EXH A hereto]. BB&T Trust could not exercise these rights without timely and accurate information concerning the Falcon investment.

standard. *See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp 956, 959 (M.D.N.C. 1997) ("the Fourth Circuit has expressed a preference for the 'most significant relationship' test" in the UDTPA context). Both standards require that North Carolina substantive law govern the Plaintiff's tort claims against MassMutual.

**a. *North Carolina Law Applies Under the Lex Loci Delicti Standard***

Under the *lex loci delicti* standard, the location of the tort determines the applicable substantive law. And North Carolina courts generally interpret the "location of the tort" to mean the location of the last event that is necessary to hold the actor liable for the tort. *See, e.g., Santana, Inc. v. Levi Strauss and Co.*, 674 F.2d 269, 272 (4th Cir. 1982).

MassMutual relies on *N.C. Mutual Life v McKinley* and *Rhone-Poulenc Agro v. Monsanto* to support its contention that the location of Plaintiff's injury – *i.e.* the location of its wallet – is determinative. *See* Motion to Dismiss, p. 12. But MassMutual's reliance on these cases is misplaced.

First, the *Rhone-Poulenc Agro* court applied North Carolina law to the misrepresentation-based tort claims at issue there, finding that, as between North Carolina and France (the location of plaintiff's world-wide headquarters), North Carolina's law was the more appropriate law to apply, in part because the plaintiff's principal negotiator was located in North Carolina. *Rhône-Poulenc Agro S.A. v. Monsanto Co.*, 73 F. Supp. 2d 554, 555 (M.D.N.C. 1999). Accordingly, North Carolina was where the plaintiff (through the negotiator) relied on the misrepresentation at issue. *See Jordan v. Shaw Indus., Inc.,* 131 F.3d 134, 1997 WL 734029, *3 (4th Cir. Nov. 26, 1997) (unpublished disposition) (upholding district court's choice-of-law determination that was based on where the plaintiffs relied).

Second, North Carolina state courts have found that the location of the act giving rise to injury, rather than the location at which the plaintiff feels the harm, controls the *lex loci delicti* determination. For example, the 1986 *United Virginia Bank* court focused on the location of the act causing the harm, not the location of the plaintiff's wallet:

> In substance the defendants argue that the plaintiff committed an unfair trade practice by representing to the defendants that they had a buyer who would pay $150,000.00 for the plane upon delivery to Norfolk, Virginia. The plane was sold in Richmond, Virginia, for the sum of $55,000.00, not $150,000.00. . . . The defendants suffered no actionable injury until the plane was sold below the promised price. Because the last act occurred in Virginia, the substantive law of Virginia applies to defendants' counterclaim.

*United Virginia Bank v. Air-Lift Assoc.*, 339 S.E.2d 90, 94 (N.C. App. 1986). Again this year, the court focused on the location of the *act* giving rise to injury, not on where the plaintiff felt the harm. In *Jones v. Skelley*, 673 S.E.2d 385 (N.C. App. 2009), a South Carolina resident sued her husband's mistress for alienation of affection based on sexual conduct that was alleged to have occurred in North Carolina. Holding that North Carolina law would apply if the allegations were true, the court reasoned that "[t]he issue of where the tortious injury occurs, and accordingly which state's law applies, is based on where the alleged alienating conduct occurred, not the locus of the plaintiff's residence or marriage." *Id.* at 389-90.

Third, the Fourth Circuit Court of Appeals has held that the location of the act that caused the harm, rather than the location where the plaintiff felt the harm, controls. For example, in *Santana*, the court held that California substantive law governed a fraud claim brought by a Missouri corporation with operations in North Carolina because the last act giving rise to the alleged injury – *i.e.*, the wrongful withholding of payment by Levi Strauss – occurred in California. *Santana*, 674 F2d at 272-73. Similarly, in *Jordan*,

the Fourth Circuit found that it was the location of plaintiff's reliance – not the location of plaintiff's harm – that determined the law applicable to the plaintiff's misrepresentation-based tort claim. *Jordan*, 1997 WL 734029 at *3.[4]

Thus, it is not the location of the plaintiff's wallet that determines which state's law applies, but rather the location of the act that causes the harm alleged. And this is true for the law applicable to the claim as well as to damages (including punitive damages) flowing from the claim. *See Stetser v. Tap Pharmaceutical Products, Inc.*, 598 S.E.2d 570, 581 (N.C. App. 2004).

Here, the misrepresentations at issue were made to, and relied on by, representatives of BB&T Trust located in North Carolina. *See, e.g.,* FAC ¶¶ 59, 65, 85-88, 116. Accordingly, the last act giving rise to the damages alleged occurred in North Carolina. Therefore, North Carolina law applies.

But even if the location of the party who is injured controls, as MassMutual argues, rather than on the location of the act that caused the injury, the result here is the same. When applying the "location of injury" standard to a trust, the location of the trust beneficiary is determinative, because it is the beneficiary who is ultimately harmed. For example, in *Koch v. Koch Industries, Inc.*, 2 F. Supp. 2d 1416 (D. Kan. 1998), the court found that it was the location of the trust beneficiary – not the trustee – that was relevant in the *lex loci delicti* analysis:

> [T]he court is satisfied that the residence of the beneficiary of the trust, not the location of the trustee, is the place where the "loss" is felt for purposes

[4] The *Rhone-Poulenc* court's attempt to distinguish the *Jordan* case was very superficial. *See Rhone*, 73 F.Supp.2d at 555, n.2. Contrary to the *Rhone* court's footnote, "reliance" and "damages" are separate elements under both Illinois and North Carolina law. *See Jordan*, 1997 WL 734029, *3 (*citing Soules v. General Motors Corp.,* 402 N.E.2d 599, 601 (Ill.1980) (reliance and damages are separate elements under Illinois law) and *Claggett v. Wake Forest University,* 486 S.E.2d 443, 447 (N.C.1997) (reliance and damages are separate elements under North Carolina law)).

> of choice of law analysis. [citations omitted] This result comports with general principals of trust law, for the trustee holds property for the benefit of the beneficiary. *See Restatement (Second) of Trusts* § 2 (1959). Economic harm to the trust is ultimately felt by the beneficiary.

*Id.* at 1423. *See also Appel v. Kidder, Peabody & Co., Inc.*, 628 F. Supp. 153, 156 (S.D.N.Y. 1986) (location of trust beneficiaries, not trustee or trust corpus, is location of trust's harm). In the present case, the beneficiary of the BB&T Trust is located in North Carolina. *See* FAC ¶¶ 87-88. Accordingly, North Carolina law applies even under MassMutual's argument.

**b.** ***North Carolina Law Applies Under the "Most Significant Relationship" Standard***

Under the "most significant relationship" standard, the fact that all of the substantive interaction between MassMutual and BB&T Trust, all of MassMutual's misrepresentations and omissions, MassMutual's breaches of duty, and BB&T Trust's reliance occurred in North Carolina dictates that North Carolina law governs the claims against MassMutual.

The issue was squarely addressed in *Simms Investment Company v. E.F. Hutton & Company Inc.*, 688 F. Supp. 193 (M.D.N.C. 1988), *reconsideration granted* 699 F. Supp. 543 (reinstating claim under Colorado Blue Sky law because it did not present conflict of law issue). The *Simms* court found that the substantive law of North Carolina applied to the plaintiff's tort claims under the "most significant relationship" standard because the alleged misrepresentations at issue and the plaintiff's reliance thereon occurred in North Carolina. *Id.* at 199. Indeed, the court noted that this conclusion comported directly with Section 148 of the *Restatement (Second) of Conflict of Laws*:

> "When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received, the

> local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship . . . ."

Just as in *Simms*, the misrepresentations, omissions, breaches of duty, and reliance at issue here all occurred in North Carolina.[5] And the trust beneficiary incurred harm in North Carolina. Accordingly, the substantive law of North Carolina governs the claims against MassMutual under the "most significant relationship" standard.

**2. North Carolina Law Applies to Plaintiff's Breach of Contract Claim**

MassMutual argues that Delaware and/or New York law applies to the breach of contract claim. *See* Motion to Dismiss, p. 13. However, under North Carolina statute, any contract of insurance on lives located in North Carolina is governed by North Carolina law:

> "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof."

N.C. Gen. Stat. § 58-3-1. The insurance contract at issue in this case insures the lives of a substantial number of people (employees of the BB&T Trust beneficiary) who live and work in North Carolina. *See, e.g.,* FAC ¶ 44. Accordingly, § 58-3-1 applies here, since North Carolina clearly has "a close connection with the interests insured." *Collins & Aikman Corp. v. Hartford Accident & Indem. Co.*, 436 S.E.2d 243, 246 (N.C. 1993) (Section 58-3-1 requires that North Carolina law apply to an insurance policy when the State has a close connection with the interests insured under the policy); *see also Continental Casualty Co. v. Physicians Weight Loss Centers of America, Inc.*, 61 Fed. Appx. 841, 2003 WL 1689530, *2-3 (4th Cir. March 31, 2003) (holding that North

[5] *See, e.g.,* FAC ¶¶ 59, 65, 85-88, 116.

Carolina law governed insurance policy that was obtained through an Ohio-based insurance agency and delivered in Ohio to an Ohio corporation because 4 out of 50 facilities insured under the policy were located in North Carolina).[6]

## B. MASSMUTUAL'S MOTION TO DISMISS MUST BE DENIED BECAUSE THE CLAIMS AGAINST MASSMUTUAL ARE PROPERLY PLED

The essential question on MassMutual's motion to dismiss under Rule 12(b)(6) "is whether the complaint, when liberally construed, states a claim upon which relief can be granted on *any* theory." *Oberlin Capital, L.P. v. Slavin*, 554 S.E.2d 840, 844 (N.C. App. 2001) (citation omitted) (emphasis in original). MassMutual's motion to dismiss must be denied unless "it appears beyond doubt that the plaintiff could not prove any set of facts to support [its] claim[s] which would entitle [it] to relief." *Hunter v. Guardian Life Ins. Co. of Am.*, 593 S.E.2d 595, 598, *disc. rev. denied*, 599 S.E.2d 49 (N.C. 2004). All material factual allegations in the complaint must be taken as true. *See Oberlin*, 554 S.E.2d at 844. Indeed, "[t]he system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Lea v. Grier*, 577 S.E.2d 411, 414-15 (N.C. App. 2003). When ruling on a 12(b)(6) motion to dismiss, the trial court should liberally construe the complaint and should not dismiss the action unless "it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Davis v. Messer*, 457 S.E.2d 902, 906-07 (N.C. App. 1995) (citations omitted).

[6] MassMutual argues in a footnote, without citation to authority, that Section 58-3-1 does not apply here because the insurance policy was issued by a Massachusetts insurer to a Delaware insured. *See* Motion to Dismiss, p. 13 n. 4. However, this argument is belied by both *Collins* and *Continental*, because both of those courts applied North Carolina law to insurance policies obtained in other states, written in other states, and sold to out-of-state insureds. *See Collins*, 436 S.E.2d at 246-47; *Continental*, 2003 WL 1689530 at *2-3.

### 1. BB&T Trust's Right to Recovery is Not Limited to Contract

Basing its argument solely on Delaware law, MassMutual contends that Counts I, II, III, IV, and VI must be dismissed because they are nothing more than restatements of the breach of contract claim. *See* Motion to Dismiss, pp. 15-16. Although MassMutual cited one Fourth Circuit case in support of this argument, it made no attempt to explain how that case applies here and made no substantive argument as to how North Carolina law requires that these claims be dismissed.[7] *Id.* Therefore, since North Carolina law governs these claims, MassMutual's motion to dismiss these claims must be denied.

Even if Delaware law were the governing law, however, MassMutual's argument is without merit. Delaware courts have recognized that the same factual circumstances can constitute both a breach of contract and a breach of an independent tort duty. For example, in *Saraga*, the defendant argued that the plaintiff's claim for conversion of materials stored with the defendant should be dismissed because the plaintiff's right to store materials arose solely from contract. Rejecting this argument, the court found that the defendant's wrongful dominion over the plaintiff's property could constitute both a breach of contract and the tort of conversion:

> Viewing the record in the light most favorable to the nonmoving party, DMI presents facts which could allow a reasonable fact-finder to conclude that the lease had been extended up to and including August 9, 2004 and that Saraga's conduct in discarding and destroying the business equipment

[7] MassMutual cites *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345-47 (4th Cir. 1998). That case is inapposite here, however. In *Broussard*, the dispute boiled down to franchisees being upset with the performance of the franchisor under the franchise agreement. Here, however, the very nature of the investment meant that BB&T Trust was precluded from monitoring the investment and that BB&T Trust was entirely dependent on MassMutual and its insurance broker Clark to act in BB&T Trust's best interests with respect to the investment. Given this relationship, MassMutual's duties went beyond pure contract, as North Carolina courts have held in other similar circumstances. *See, e.g., Zubaidi v. Earl L. Pickett Enters., Inc.*, 164 N.C. App. 107, 115, 595 S.E.2d 190, 194 (2004) (where a breach of contract "'smack[s] of tort because of the fraud and deceit involved,'" North Carolina law allows a plaintiff to pursue a tort claim and punitive damages (quoting *Oestricher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 136, 225 S.E.2d 797, 808-09 (1976)).

> and records located at the Property breached both the contract between the parties and an independent duty to refrain from converting DMI's personal property.

*Data Mgmt. Int'l, Inc. v. Saraga*, 2007 WL 2142848, *3-4 (Del. Super. Ct. July 25, 2007). The court further noted that despite the contractual relationship, a separate tort duty also arose out of that relationship. *Id.* at *4, fn. 32.

Just as in the *Saraga* case, the defendant's conduct here breached both the contract at issue and independent tort duties imposed by law. In this case, those tort duties required that MassMutual refrain from misrepresenting (fraudulently and/or negligently) the performance of the funds that BB&T Trust entrusted to MassMutual to invest on its behalf. This is all the more the case given the design of the relationship – all parties knew that BB&T Trust was entirely dependent upon MassMutual (and Clark) to monitor the investment, accurately and timely report the financial performance of the investment to BB&T Trust, and take action to protect the value of the investment within the guidelines stated in the governing documents, including the sale and purchase of assets in BB&T Trust's Stable Value Portfolio. *See, e.g.,* FAC ¶¶ 21, 25, 32, 34, 91; *see also* PPM App. B, pp. 3, 5 [EXH A hereto] (detailing conditions under which MassMutual had discretion (or was required) to buy and sell assets in BB&T Trust's Stable Value Portfolio). Delaware courts have found a fiduciary obligation to exist in such circumstances. *See, e.g., Forsythe v. ESC Fund Mgmt. Co., Inc.*, 2007 WL 2982247, *10 (Del. Ch. October 9, 2007) (fiduciary relationship arose from investment agreement where investment managers could buy and sell investments for owners' account within established guidelines).

### 2. The Economic Loss Doctrine Does Not Negate BB&T Trust's Negligence and Negligent Misrepresentation Claims

MassMutual submits no North Carolina authority for its contention that the negligence and negligent misrepresentation claims should be dismissed. Accordingly, MassMutual's motion to dismiss these claims must be denied.

These claims also survive despite MassMutual's contention that Delaware's "economic loss doctrine" negates these claims. First, the negligent misrepresentation claim is exempt from the economic loss doctrine. *See Christiana Marine Service Corp. v. Texaco Fuel and Marine Marketing, Inc.*, 2002 WL 1335360, *6-7 (Del. Super. 2002).[8]

Second, BB&T Trust's negligence claim also survives the Delaware economic loss doctrine. While Delaware has extended the economic loss doctrine beyond its products liability roots, it specifically has not extended the doctrine to prevent the recovery of economic losses resulting from professional negligence. *See Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1201 n.5 (Del. 1992). Indeed, Delaware has recognized the existence of such an exception in other jurisdictions "when the underlying contract is for the rendering of professional services." *Hatzel & Buehler, Inc. v. Orange & Rockland Utilities, Inc.*, 1992 WL 391154, *15 n.21 (D. Del. Dec 14, 1992) (discussing New York's exceptions to the economic loss doctrine). *See also Millsboro Fire Co. v. Constr. Mgmt. Serv., Inc.*, 2000 WL 1654834, *4 (Del. Ch. Oct. 20, 2000) (excepting financial advisors from "economic loss" bar to negligent misrepresentation claim). Mass Mutual breached its duty of care to BB&T Trust in rendering its

[8] Contrary to MassMutual's contention, MassMutual was in the business of supplying information (i.e. performance of the Falcon investment) to BB&T Trust for its use in business transactions (i.e. shareholders, auditors, business counterparties, Clark). *See, e.g.,* FAC ¶¶ 25-26, 32, 34. *See RLI Insur. Co. v. Indian River Sch. Dist.*, 2006 WL 1749069, *2 (D. Del. June 20, 2006) (holding that, where the plaintiff has alleged that the defendant is in the business of supplying information, the determination is, at a minimum, not made properly until the summary judgment stage).

professional services. Accordingly, the economic loss doctrine does not bar BB&T Trust's negligence claim.

### 3. BB&T Trust's Claims for Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty are Properly Pled

MassMutual submits no North Carolina authority for its contention that the breach of fiduciary duty and aiding and abetting claims should be dismissed. Accordingly, the motion to dismiss these claims must be denied.

Further, these claims are properly pled even if Delaware law were held to apply. MassMutual relies on the *Wal-Mart Stores, Inc. v. AIG Life Insurance Co.* case to argue that MassMutual did not owe a fiduciary duty to BB&T Trust. *See* Motion to Dismiss, pp. 17-18. MassMutual's reliance is misplaced, however, because of key differences in the facts of that case compared to the facts here.

Wal-Mart argued that it and its insurer entered into a partnership or joint venture arrangement whereby they would both profit from Wal-Mart's borrowing – Wal-Mart would profit from the tax deductions realized from the interest payments on the loan taken out to pay the COLI premiums, and the insurer would profit from the sale of the COLI policy. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 114 (Del. 2006). The court recognized, however, that the parties' interests were not aligned and that there was no evidence of the partnership or joint venture that Wal-Mart alleged. *Id.*

Thus, the benefit of Wal-Mart's plan was the ability to (a) buy the insurance, (b) borrow back the premium, and (c) take a tax deduction for the "interest" paid on the loan. *See Wal-Mart*, 901 A.2d.at 111. But the BOLI plan here does not work this way. Rather, it is an investment vehicle – BB&T Trust paid $112 million in premiums to MassMutual, those premiums were invested for BB&T Trust's benefit, and gains on the investment

inured to BB&T Trust's benefit on a tax-deferred basis. *See* FAC ¶¶ 21, 43. The key feature of the BOLI investment vehicle that gives rise to a fiduciary duty here – a feature that was not part of the Wal-Mart COLI tax-shelter – is that BB&T Trust was precluded from interacting directly or indirectly with the Falcon Fund investment advisor and that, therefore, Clark and MassMutual were obligated to do so on BB&T Trust's behalf. *See* FAC ¶¶ 25-26. Thus, BB&T Trust placed a special trust and confidence in MassMutual to properly monitor the Falcon investment, to report back to BB&T Trust in a timely, accurate, and truthful manner, and to take action to protect the value of the investment, including the purchase and sale of assets within the Stable Value Portfolio. *See* FAC ¶ 91; PPM App. B, pp. 3, 5 [EXH A hereto]. Thus, (1) there was an alignment of interests between MassMutual and BB&T Trust because both were seeking to maximize returns on the Falcon investment,[9] (2) MassMutual exerted a level of control or domination over BB&T Trust in that it controlled the flow of information to BB&T Trust, and (3) MassMutual engaged in self-dealing, in that it either intentionally or recklessly protected its commissions from the Falcon Fund investment (both from BB&T Trust and from the other two, much larger, investors in Falcon) at the expense of timely and accurate reporting to BB&T Trust. *See* FAC ¶¶ 81-84, 90.

This is exactly the type of relationship that the Delaware courts have found to be fiduciary in nature. *See, e.g., Forsythe*, 2007 WL 2982247 at *10 (fiduciary relationship arose from investment agreement where investment managers could buy and sell investments for owners' account within established guidelines). And because Clark also owed a fiduciary duty to BB&T Trust,[10] MassMutual's motion to dismiss BB&T Trust's

[9] MassMutual received recurring commissions based on the Falcon fund's performance. FAC ¶81.
[10] *See* BB&T Trust's Response to Clark's Motion to Dismiss, Section III.B.3.a.

aiding and abetting claim must be denied. *See* Motion to Dismiss, p. 19 (only basis for seeking to dismiss the aiding and abetting claim is the argument that Clark owed no fiduciary duty to BB&T Trust).

**4. BB&T Trust's Claim for Breach of Contract is Properly Pled**

MassMutual submits no North Carolina authority for its contention that the breach of contract claim should be dismissed. Accordingly, the motion to dismiss this claim must be denied.

The breach of contract claim is also properly stated under Delaware law.

**a. *MassMutual's Contention that BB&T Trust Lacks Third Party Beneficiary Status is a Red Herring***

In the Letter Agreement between MassMutual and BB&T Trust, MassMutual agreed to fulfill its obligations under the SVA and to cause Bank of America to do so as well. *See* FAC ¶ 45; Letter Agreement p. 4, ¶ 9 [EXH B hereto]. Thus, MassMutual was contractually obligated *to BB&T Trust* to comply with its obligations under the SVA. MassMutual's obligations under the SVA included the obligation to provide notice of any condition constituting a Reallocation Event, and to liquidate the Falcon Fund investment upon the occurrence of any such condition. *See* Section III.B.4.b., below (discussing MassMutual's contractual obligations). MassMutual failed to do either. *See* FAC ¶¶ 57-58. That failure was a breach of MassMutual's contractual obligation to BB&T Trust under the Letter Agreement. Therefore, MassMutual's contention that BB&T Trust is not a third party beneficiary of the SVA[11] is a red herring – MassMutual breached the Letter Agreement, and BB&T Trust's breach of contract claim is based on that breach of the Letter Agreement. *See* FAC ¶¶ 122-127.

[11] *See* Motion to Dismiss, pp. 19-20.

### b. *MassMutual's Contention that it had no Monitoring or Reallocation Event Obligations to BB&T Trust is False*

In the Letter Agreement between MassMutual and BB&T Trust, MassMutual agreed to use reasonable efforts to cause Bank of America to perform its obligations under the SVA. *See* FAC ¶ 45; Letter Agreement p. 4, ¶ 9 [EXH B hereto]. Implicit in this contractual provision is MassMutual's promise to BB&T Trust that MassMutual would perform its own obligations under the SVA, since MassMutual would be unable to cause Bank of America to perform under the SVA if MassMutual itself were in breach of the SVA. *See Reddy v. PrimeCare Int'l, Inc.*, 2000 WL 1654834, *4 (Del. Ch. Oct. 20, 2000) (holding that material breach by one party to a contract excuses non-performance by the other party). One of MassMutual's obligations under the SVA was to monitor for and provide notice of any of the events or conditions that constituted 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:
>
> a. Gross … NAV of Bank Dedicated Diversified Fund drops greater than 7% over a period of one month or less.
>
> . . .
>
> c. If, after the first anniversary of the Effective Date, 1-year rolling annualized standard deviation of monthly Gross NAV of Bank Dedicated Diversified Fund is greater than 10%.

*See* PPM Appendix B, p. 7 [EXH A hereto]. Further, Appendix B also makes clear that "[i]f a Reallocation Event occurs, the Stable Value Portfolio must consist solely of cash and units of the Fixed Income Subaccounts …." *See* PPM Appendix B, p. 3 [EXH A hereto]. Thus, when "trigger c" quoted above was hit in August 2007, this was a Reallocation Event that required MassMutual to ensure that the Stable Value Portfolio consisted "solely of cash and units of the Fixed Income Subaccounts." *See* PPM

Appendix B, pp. 3, 7 [EXH A hereto]. When "trigger a" quoted above was hit in November 2007, this was another Reallocation Event[12] that required MassMutual to ensure that the Stable Value Portfolio consisted "solely of cash and units of the Fixed Income Subaccounts." *See* PPM Appendix B, pp. 3, 7 [EXH A hereto]. And since the Falcon Fund investment was not one of the "Fixed Income Subaccounts,"[13] these Reallocation Events required that the Falcon Fund investment be liquidated.

Thus, MassMutual's contention that it had no monitoring, notice, or Reallocation Event obligations is belied by the Letter Agreement and the PPM. BB&T Trust could not make informed decisions about its rights and alternatives with respect to the investment without notice of a triggering event, and the ability to provide such notice required that MassMutual monitor for such an event. Thus, it is clear that there is a "state of facts which could be proved in support of the claim," especially when the complaint is construed liberally as the Court is required to do in the 12(b)(6) context. *Davis*, 457 S.E.2d at 906-07.

**c. *BB&T Trust's Damages are Not Limited to Those Sustained After December 31, 2007***

MassMutual argues that BB&T Trust's damages should be limited to those sustained after December 31, 2007 because "[b]oth 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." *See* Motion to Dismiss, p. 23. But the Stable Value Endorsement addresses only when funds from the liquidation are to be released, not the deadline by which the liquidation is to occur. *See*

[12] The Stable Value Provider – Bank of America – did not elect to waive either of these Reallocation Events. *See* FAC ¶¶ 53, 61.
[13] *See* PPM Appendix B, p. 2 [EXH A hereto] (the Falcon Fund is not included in the list of investments that are "Fixed Income Subaccounts").

Stable Value Endorsement, p. 4 ("**Advance Notice.** Transfers, loans, and partial withdrawals from the Falcon Strategies Division will be *released* on or after …." (emphasis added)). And the SVA provides a *deadline* by which the liquidation must occur, not a limitation on how quickly the liquidation can occur. *See* SVA, p. 3 ("… as soon as practicable, but no later than the twenty-fifth (25th) day, following the last day of the calendar quarter …"). Further, as discussed above in Section II.C., BB&T Trust has alleged that it would have been able to negotiate a rapid liquidation in which any waiting periods or advance notice requirements for such liquidation were waived.[14] *See, e.g.,* FAC ¶ 119. Thus, an issue to be proven at trial will be how quickly the Falcon investment could have been liquidated consistent with the "as soon as practicable" deadline.

**5. BB&T Trust's Unfair and Deceptive Trade Practices Claim is Properly Pled**

As discussed above in Section III.A.1.b., North Carolina law governs the UDTPA claim. MassMutual contends that the UDTPA claim is not sufficiently pled under North Carolina law because (i) BB&T Trust's tort claims are nothing more than re-cast contract claims, (ii) BB&T Trust has not sufficiently pled the requisite aggravating circumstances, and (iii) BB&T Trust is neither a "traditional consumer" nor in competition with MassMutual. *See* Motion to Dismiss, p. 24.

First, as indicated above in Sections III.B.1 – III.B.3, BB&T Trust's tort claims are viable claims that have been pled with the requisite specificity.

[14] Indeed, as MassMutual well knows, in late 2007, BB&T Trust had taken steps to liquidate its Falcon investment as quickly as it could in the absence of knowledge that a Reallocation Event had occurred, and had engaged in negotiations, through Clark and MassMutual, to modify the stable value protection applicable to BB&T Trust's BOLI investment. Thus, MassMutual's insistence on additional allegations of contemporaneous facts appears to be an attempt to get a second bite at the motion-to-dismiss apple by forcing an amendment to the complaint.

Second, BB&T Trust has sufficiently pled the requisite aggravating circumstances. Both fraud and negligent misrepresentation are a sufficient basis for a UDTPA claim. *See, e.g., Hardy v. Toler*, 218 S.E.2d 342, 346 (N.C. 1975) (fraud is a sufficient basis for a UDTPA claim); *Forbes v. Par Ten Group, Inc.*, 294 S.E.2d 643, 651 (N.C. App. 1990) *disc. rev. denied* 402 S.E.2d 824 (N.C. 1991) (negligent misrepresentation is a sufficient basis for a UDTPA claim). Further, an act that constitutes both a breach of contract and an intentional misrepresentation made to deceive another and that has the natural tendency to injure another can be a sufficient basis for a valid UDTPA claim. *See N.C. Mut. Life Ins. Co. v. McKinley Fin. Servs., Inc.*, 2005 WL 3527050, *10 (M.D.N.C. Dec. 22, 2005). Here, MassMutual intentionally misrepresented to BB&T Trust that no Reallocation Event trigger had been hit in August 2007, and intentionally failed to timely report the November 2007 Reallocation Event trigger. *See* FAC ¶¶ 80-84. Intentional misrepresentations like these have been found to be a sufficient basis for a valid UDTPA claim. *See, e.g., N.C. Mut. Life Ins. Co.*, 2005 WL 3527050 at *12 (finding that the intentional destruction of documents in preparation for an audit was a sufficient basis for a UDTPA claim).

Third, MassMutual has cited no authority supporting its argument that BB&T Trust must be a "traditional consumer" or in competition with MassMutual to have standing to bring a UDTPA claim. MassMutual relies on the *Food Lion* case for this proposition, but that reliance is misplaced. In fact, the *Food Lion* case says nothing about limiting UDTPA claims to "traditional consumers," and says that business consumers can bring a UDTPA claim against another business with whom they are in competition *or with whom they are doing business*. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194

F.3d 505, 520 (4th Cir. 1999). Indeed, North Carolina courts have routinely held that businesses have standing to pursue UDTPA claims. *See, e.g., Olivetti Corp. v. Ames Bus. Sys., Inc.*, 344 S.E.2d 82 (N.C. App. 1986) *rev'd on other grounds*, 356 S.E.2d 578 (N.C. 1987).

("It is clear that individual consumers are not the only ones protected and provided a remedy under *G.S. SS 75.1.1* and *75-16*.); *see also Concrete Servs Corp. v. Investors Group, Inc.*, 340 S.E.2d 755 (N.C. 1986) (stating that "[t]he statutes do not protect only individual consumers, but serve to protect business persons as well" and concluding that "[t]he fact that plaintiff is a corporation is…immaterial.*")*.

## IV. CONCLUSION

For the foregoing reasons, MassMutual's Motion to Dismiss should be denied. If the Court should find that one or more claims have not been sufficiently pled, the Court should allow BB&T Trust the opportunity to replead those claims to correct any pleading defect.[15]

Respectfully submitted, this 1st day of October, 2009.

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[15] *See Mascaro v. Mountaineer Land Group, LLC,* 2006 NCBC 18, 68 (N.C. Super. Ct. 2006) (exercising discretion in granting plaintiff's alternative motion for leave to amend and granting motion to dismiss without prejudice); *Matrix Capital Mgmt. Fund, L.P. v. BearingPoint, Inc.*, 576 F.3d 172 (4th Cir. 2009) (finding reversible error in the trial court's dismissal with prejudice where a second amended complaint could have cured the deficiencies).

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**CERTIFICATE OF COMPLIANCE WITH RULE 15.8**

I, Mark Vasco, certify that the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

/s/ Mark Vasco
Mark Vasco

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** was served on all parties to this action this 1st day of October, 2009, via the Business Court's electronic filing system and electronic mail, as follows:

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