

EXHIBIT 1F

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

JOHN W. GRIFFITHS, on behalf of himself)
and all others similarly situated,)
)
Plaintiff,)

v.)

AVIVA LONDON ASSIGNMENT)
CORPORATION, AVIVA LIFE)
INSURANCE COMPANY, CGU)
INTERNATIONAL INSURANCE, plc,)
ATHENE HOLDING, LTD, ATHENE)
LONDON ASSIGNMENT CORPORATION)
and ATHENE ANNUITY AND LIFE)
COMPANY,)
)
Defendants.)

Civil Action No. 1:15-cv-13022-NMG

**ATHENE DEFENDANTS’ OPPOSITION TO MOTION FOR
LEAVE TO FILE A SECOND AMENDED COMPLAINT**

Defendants Athene London Assignment Corporation (f/k/a Aviva London Assignment Corporation), Athene Holding Ltd., and Athene Annuity and Life Company (successor to Aviva Life Insurance Company) (collectively, “Athene Defendants”), by their counsel, submit this Opposition to Plaintiff’s Motion for Leave (“Motion for Leave”) to File a Second Amended Complaint (“Proposed Complaint”) and Plaintiff’s Memorandum in Support (“Memo.”), by which Plaintiff seeks leave to add a new claim for alleged violations of the Massachusetts Consumer Protection Act (“Chapter 93A”).

The Court should deny Plaintiff’s Motion for Leave for three reasons. First, Plaintiff, a Hawai’i resident, has no standing to represent himself or a putative class for a claim under Chapter 93A. Second, Plaintiff demonstrated undue delay by waiting more than a year to seek to amend the complaint. Third, amendment would be futile because a Chapter 93A claim violates Rule 8 and hence fails to state a claim. The Court should deny the Motion for Leave.

STANDARD OF REVIEW

Rule 15(a) allows a court to grant leave to amend when justice so requires. However, an amendment is not warranted when it would be futile or would reward undue delay. *Raposo v. Garelick Farms, LLC*, 388 F.R.D. 8, 9-10 (D. Mass. 2012) (Gorton, J.) (citing *Resolution Tr. Corp. v. Gold*, 30 F.3d 251, 253 (1st Cir. 1994). “‘Futility’ means that the complaint, as amended, would fail to state a claim upon which relief could be granted,” using “the same standard of legal sufficiency as applies to a Rule 12(b)(6) motion.” *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996). “When considerable time has elapsed between the filing of the complaint and the motion to amend, the movant has the burden of showing some valid reason for his neglect and delay.” *Raposo*, 288 F.R.D. at 10 (quoting *Stepanischen v. Merchs. Despatch Transp. Corp.*, 722 F.2d 922, 933 (1st Cir. 1983) (internal quotation marks omitted)).

ARGUMENT

I. Plaintiff has no standing to bring a claim on behalf of himself or a putative class for a violation of Chapter 93A

The Athene Defendants hereby adopt and incorporate Part I.A of the Memorandum of Law in Opposition to Plaintiff’s Motion for Leave to File a Second Amended Complaint (“Opposition”) of Defendant Aviva International Insurance Limited (f/k/a CGU International Insurance, plc) (“CGU”). For the reasons stated in CGU’s Opposition, Plaintiff, a Hawai’i resident, cannot bring a claim under Chapter 93A against the Athene Defendants personally or on behalf of a putative class.

II. Plaintiff should not be rewarded for his undue delay in seeking leave to amend the complaint, which will unfairly prejudice the Athene Defendants

The Athene Defendants further adopt and incorporate Parts I.B and I.C of CGU’s Opposition. For the reasons stated in CGU’s Opposition, Plaintiff’s undue delay, which will result in unfair prejudice to the Athene Defendants, is another reason to deny the Motion for

Leave. The Athene Defendants note that they (like CGU) also produced a copy of the Capital Maintenance Agreement at issue in this case more than a year ago on August 1, 2016.

III. Plaintiff’s proposed Chapter 93A claim is futile because it fails to state a claim against the Athene Defendants

Rule 8 requires a plaintiff to include “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The complaint must “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint “demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Further, a complaint fails to comply with Rule 8 when it “collectively” asserts claims “against the defendants.” *Moseley v. Spencer*, No. Civil Action No. 15-13661, 2016 WL 347305, at *4 (D. Mass. Jan. 27, 2016). “Where a plaintiff brings a claim against multiple defendants, the plaintiff must take care to present his complaint in such a manner that it is clear what the alleged factual allegations and legal claims are against each individual defendant.” *Burnham v. Dudley Dist. Ct.*, Civil Action No. 15-40031, 2015 WL 5698418, at *5 (D. Mass. Sept. 28, 2015). *See also Fennick v. Allesandro*, Civil Action No. 16-10957, 2016 WL 3255014, at *3 (D. Mass. June 10, 2016) (citing *Bagheri v. Galligan*, 160 F. App’x 4, 5 (1st Cir. 2005) (holding complaint “deficient because, among other things, it failed to state clearly which defendant or defendants committed each of the wrongful acts” in violation of notice pleading standards)). A complaint that lumps defendants together makes it “immensely unfair” to defendants to “try and cull out what alleged actions or inactions . . . are meant to form the basis for the” claims against them. *Moseley*, 2016 WL 347305, at *4.

Plaintiff’s proposed Chapter 93A claim unintelligibly lumps all of the defendants together and therefore fails to state a claim against the Athene Defendants. In some paragraphs,

the allegations “generally attribute misconduct to the ‘Defendants’ collectively, and do not differentiate between” the defendants or attribute any forbidden conduct to the Athene Defendants. *TheECheck.com, LLC v. NEMC Fin. Servs. Grp. Inc.*, No. 16-cv-8722, 2017 WL 2627912, at *2 (S.D.N.Y. June 16, 2017). For example, Plaintiff alleges that “all Defendants were engaged in trade or commerce within the meaning of [Chapter 93A]”; “[a]ll Defendants agreed on the content of all marketing materials that would be used to describe the CMA”; and “Defendants [without specifying particular defendants] believed that . . . [they] had the right to terminate the CMA Guarantee at any time.” Prop. Compl. ¶¶ 105-07. Defendants, however, “are distinct legal entities” and as such these allegations plainly violate Rule 8. *Patrico v. Voya Fin., Inc.*, No. 16 Civ. 7070, 2017 WL 2684065, at *5 (S.D.N.Y. June 20, 2017). Moreover, these allegations are impossible to reconcile with other allegations of the Proposed Complaint, which make clear that at least some of the Athene Defendants (e.g., Athene Holding, Ltd.) were not even in the picture until Aviva USA Corporation was sold to Athene Holding, Ltd. in October 2013, Prop. Comp. ¶¶ 13, 61, more than 10 years after the annuity as to which Plaintiff is the beneficiary was purchased, *id.* ¶ 31. *See Patrico*, 2017 WL 2684065, at *5 (dismissing complaint as to defendants who were not party to contract underlying the dispute since the complaint did “not allege any specific relevant conduct” by them).

In other paragraphs, Plaintiff attributes blame to the Athene Defendants based solely on alleged conduct of the *other* defendant. For example, Plaintiff alleges that “Defendants [again without specification] knew there was and is no merit to the position they have taken” based on revelations “in the *internal* discussions of CGU and its parent AVIVA plc,” Prop. Compl. ¶ 116; “AVIVA personnel acknowledged that . . . there remained a possibility that Athene would fail and that Annuity holders would invoke the CMA,” *id.* ¶ 118; and other “*internal* discussion” within

the *other* defendant allegedly made clear that claims such as Plaintiff's claim "would be made," *id.* ¶ 118 (emphases added).

Plaintiff's Memorandum also wrongly suggests that the testimony of Mr. Harrison, a 30(b)(6) witness for the *other* defendant, could be attributed to the Athene Defendants.

According to Plaintiff, Mr. Harrison testified "that in their view they had always had the right to walk away from the guarantee," Memo. at 2. But the Memorandum does not identify which "their" and "they" are implicated in that testimony. To the extent Plaintiff purports to extend Mr. Harrison's testimony to the Athene Defendants, however, numerous witnesses from the Athene Defendants have testified exactly the *opposite* of what Mr. Harrison stated:

- Debra Fickett-Wilbar, who was Assistant Vice President of Structured Settlements for certain of the Athene Defendants in 2002, testified that she believed the 2002 CMA meant "[t]hat [Aviva] London was going to protect the policies that had the CMA regardless of what happened in the future." Ex. 1¹ at 8:8-11, 56:15-17.
- Richard Kypta, the former COO for certain of the Athene Defendants, testified that his understanding was that the 2002 CMA would "remain effective following the termination as to structured settlement payment obligations that were assumed before that termination unless it's prohibited by applicable law." Ex. 2 at 8:9-21, 33:6-21.
- Stephen Cernich, the former Chief Corporate Development Officer for an affiliate of the Athene Defendants, testified that "[w]e didn't think that with the stroke of a pen we could wipe [the 2002 CMA] out." Ex. 3 at 17:12-24, 38:19-21.

By asserting a Chapter 93A claim against all defendants, "lumping all the defendants together . . . and providing no factual basis to distinguish their conduct," *Fennick*, 2016 WL 3255014, at *3 (citing *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001)), and by providing only a factual basis that might allege an claim against the other defendant, Plaintiff fails to state an MCPA claim against the Athene Defendants.

¹ Exhibits are attached to the Declaration of Hille R. Sheppard, filed concurrently herewith.

CONCLUSION

For the reasons set forth above, the Motion for Leave should be denied.

Dated: September 15, 2017

Respectfully submitted,

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and Athene Annuity and Life Company*

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, a true and correct copy of the foregoing was served on counsel of record via the Court's CM/ECF system.

/s/ Jack W. Pirozzolo

Jack W. Pirozzolo