IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CONSOLIDATED WEALTH MANAGEMENT, LLC and JOHN SPALDING, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 4:18-03268
RHONDA SHORT, Defendant.	§	

MEMORANDUM AND ORDER

Before the Court in this dispute over life insurance proceeds is Defendant Rhonda Short's Motion for Summary Judgment ("Motion") [Doc. # 35]. Plaintiffs Consolidated Wealth Management, LLC ("CWM") and John Spalding have responded,[1] and Mrs. Short replied.[2] The Motion is ripe for decision. Based on the parties' briefing, pertinent matters of record, and relevant legal authority, the Court **grants** Defendant Short's Motion for Summary Judgment.

I. BACKGROUND

In January 2014, James Short, a resident of West Virginia and Plaintiff Rhonda Short's husband, was recovering from treatment for cancer. He had recently been diagnosed with metastatic melanoma and was disabled from work at Special Metals Corporation ("SMC"). SMC's benefits plan included a group life

[1] Plaintiffs' Response to Defendant's Motion for Summary Judgment ("Response") [Doc. # 36].

[2] Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment ("Reply") [Doc. # 38].

policy, Cigna policy FLX-965096 (the "Cigna Policy"),[3] which provided Mr. Short life insurance benefits of $116,400.

On January 14, 2014, Mr. Short entered into a Senior Facilitation Agreement ("SFA")[4] with Derek Miller, who was employed by Montage Financial Group ("Montage") as director of underwriting.[5] Montage played no role in Miller's transaction with Mr. Short and is not a party to the SFA.[6] Under the terms of the SFA, Mr. Short agreed to assign his interest in the Cigna Policy to Miller in exchange for a payment of $25,016. The SFA states that it "shall be governed by and construed in accordance with the laws of the State of West Virginia."[7]

Three days after entering the SFA with Mr. Short, Miller assigned his entire interest in the Cigna Policy to Plaintiff CWM for a payment of $37,700.[8] From the date of assignment until Mr. Short's eventual demise in June 2018, CMW reimbursed Mr. Short for his payment of life insurance premiums.

On August 1, 2017, Sun Life Assurance Company of Canada issued policy no. 900822 (the "Sun Life Policy"), which went into effect as SMC's group life insurance policy.[9] Under the Sun Life Policy, Mr. Short was insured for a total of

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3 Group Policy [Doc. # 36-1].

4 Senior Facilitation Agreement ("SFA") [Doc. # 35-1].

5 Declaration of Derek Miller ("Miller's Declaration") [Doc. # 36-4], ¶ 2.

6 *See id.* ¶ 4.

7 SFA ¶ 6.

8 Life Settlement Purchase Agreement [Doc. # 38-3].

9 Policy no. 900822 [Doc. # 36-3].

$128,192 of group term life insurance.[10] Mr. Short named his wife, Defendant Rhonda Short ("Mrs. Short"), as the sole beneficiary of the Sun Life Policy.[11]

On June 22, 2018, Mr. Short passed away.[12] Mrs. Short thereafter filed a claim under the Sun Life Policy.[13] Plaintiffs CWM and John Spalding, a member of CWM, together made a competing claim for benefits.[14]

On September 13, 2018, Sun Life filed a Complaint for Interpleader [Doc. # 1] in this Court and named Mrs. Short, CWM, and Spalding as defendants.[15] Mrs. Short, CWM, and Spalding appeared and answered.[16] Sun Life deposited the full $129,000 policy benefits into the Registry of the Court and was discharged from further liability.[17] On November 13, 2018, this Court dismissed Sun Life

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10 Letter from Sun Life Financial Re: Group Life Insurance Coverage: James M. Short [Doc. # 1-7] (ECF 3).

11 Beneficiary Designation [Doc. # 1-6].

12 Physician's/Medical Examiner's Certificate of Death [Doc. # 1-10].

13 Claimant's Statement, signed by Rhonda Short [Doc. # 1-2]. Before he passed away, Mr. Short brought a claim for accelerated death benefits. Mr. Short passed away before the claim was processed, so Sun Life converted the claim to a claim for death benefits.

14 Claimant's Statement, signed by John Spalding [Doc. # 1-11].

15 Plaintiffs assert in passing that because the Sun Life Policy is an ERISA plan, Sun Life's benefits determination should be reviewed under an abuse of discretion standard. *See Cooper v. Hewlett Packard Co.*, 592 F.3d 645, 651-52 (5th Cir. 2009). Sun Life, however, never made a benefits determination, as demonstrated by its Complaint for Interpleader, requesting the Court determine who is the appropriate recipient of plan benefits.

16 Original Answer of Defendant Rhonda Short [Doc. # 22]; Original Answer and Cross-Claim of Defendants Consolidated Wealth Management, LLC, and John Spalding [Doc. # 25].

17 Order Granting Motion to Allow Interpleader of Funds [Doc. # 17].

from this action.[18] On January 14, 2019, the Court re-aligned the parties, designating CWM and Spalding as Plaintiffs and Mrs. Short as Defendant.

Plaintiffs and Mrs. Short assert competing claims to the $129,000 in policy benefits in the Registry of the Court.[19] Mrs. Short seeks summary judgment that Plaintiffs' claim to the benefit fails and she is entitled to all the Sun Life Policy benefits.

II. SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56, "[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." FED. R. CIV. P. 56(a). Summary judgment on a claim or part of a claim is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Seacor Holdings, Inc. v. Commonwealth Ins. Co.*, 635 F.3d 675, 680 (5th Cir. 2011) (quoting FED. R. CIV. P. 56(a)).

For summary judgment, the initial burden falls on the movant to identify areas essential to the non-movant's claim in which there is an "absence of a genuine issue of material fact." *ACE Am. Ins. Co. v. Freeport Welding & Fabricating, Inc.*, 699 F.3d 832, 839 (5th Cir. 2012). The moving party, however, "need not negate the elements of the nonmovant's case." *Coastal Agric. Supply, Inc. v. JP Morgan Chase Bank, N.A.*, 759 F.3d 498, 505 (5th Cir. 2014) (quoting *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005)). The moving

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18 Order Granting Motion to Discharge and Dismiss Sun Life Assurance Company of Canada [Doc. # 27].

19 First Amended Complaint of Consolidated Wealth Management, LLC, and John Spalding [Doc. # 32]; First Amended Answer of Defendant Rhonda Short and Claim for Benefits in the Registry of the Court [Doc. # 33].

party may meet its burden by pointing out "the absence of evidence supporting the nonmoving party's case." *Malacara v. Garber*, 353 F.3d 393, 404 (5th Cir. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Stults v. Conoco, Inc.*, 76 F.3d 651, 656 (5th Cir. 1996)).

In deciding whether a genuine and material fact issue has been created, the court reviews the facts and inferences to be drawn from them in the light most favorable to the nonmoving party. *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir. 2003). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant. *Tamez v. Manthey*, 589 F.3d 764, 769 (5th Cir. 2009) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

III. DISCUSSION

Defendant Rhonda Short contends summary judgment in her favor is appropriate for two reasons. First, Mrs. Short argues the SFA—the transaction between Mr. Short and Derek Miller that forms the basis of Plaintiffs' claim to Mr. Short's policy benefits—is void under West Virginia law, the governing jurisdiction. Second, Mrs. Short argues in the alternative that, if the SFA is valid, the SFA only assigned Mr. Short's interest in the now-lapsed Cigna Policy, not the Sun Life Policy at issue in this lawsuit.

The Court finds both contentions persuasive. The SFA is void and unenforceable under West Virginia law regulating sales of terminally ill policyholder's life insurance policies, so-called "viatical settlement agreements." In the alternative, if the SFA is valid, it unambiguously transfers Mr. Short's interest *only* in the Cigna Policy and not his interest in any replacement policies. Accordingly, the Court **grants** summary judgment in Mrs. Short's favor.

A. The SFA Is an Unenforceable Viatical Settlement Agreement

Mrs. Short contends the SFA, the transaction between Mr. Short and Derek Miller that forms the basis of Plaintiffs' claim to Mr. Short's policy benefits, is unlawful and void. By its terms, the SFA is governed by the laws of West Virginia.[20] Under West Virginia law, "viatical settlement contracts" must be preapproved by West Virginia's Insurance Commissioner, *see* W. Va. Code § 33-13C-5(a), and "viatical settlement providers" are subject to strict licensing and disclosure requirements, *see id.* §§ 33-13C-3(a)(1), 8(a). Mrs. Short argues those requirements were not followed, rendering the SFA unlawful and void. Plaintiffs respond that Miller was not a "viatical settlement provider" when he entered into the SFA and therefore the SFA is not a "viatical settlement contract" under West Virginia law.[21]

The Court concludes that Miller qualifies as a viatical settlement provider under West Virginia law. Accordingly, his failure to abide by West Virginia's statutory requirements for viatical settlement contracts when drafting, negotiating, and entering into the SFA renders the SFA void and unenforceable.

1. West Virginia's Viatical Settlement Act

The West Virginia Legislature, like many other state legislatures, has enacted a statutory scheme to regulate so-called viatical settlements, which are sales of terminally or chronically ill policyholders' life insurance in exchange for lump-sum payments less than the policy's full value. *See Viatical Settlement*,

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20 SFA ¶ 6.

21 Plaintiffs argue that even if the SFA is a viatical settlement contract, it complies with West Virginia's consideration requirements for viatical settlement contracts. Plaintiffs, however, do not argue that Miller complied with West Virginia's other statutory requirements.

BLACK'S LAW DICTIONARY (10th ed. 2010). West Virginia's Viatical Settlement Act prohibits the "use [of] a viatical settlement contract form" unless "it has been filed with and approved by the [West Virginia Insurance Commissioner.]" *See* W. VA. CODE § 33-13C-5(a). Moreover, under the Act, "viatical settlement providers" must obtain a license from the Commissioner, file an annual statement with the Commissioner, and are tasked with making numerous disclosures to the insured, also known as viators, whose policy benefits they purchase. *See id.* §§ 33-13C-3, 13C-6, 13C-8.

No genuine dispute exists that Miller did not comply with these requirements. Miller drafted the SFA and there is no evidence in the record indicating he obtained approval of the SFA with the Commissioner.[22] Moreover, Miller testified he is not licensed by West Virginia as a viatical settlement provider.[23] Plaintiffs do not contest that Miller did not comply with several of West Virginia's disclosure requirements for viatical settlement contracts.

The parties instead dispute whether the Viatical Settlement Act's requirements applied to the SFA. As stated, in general, the Act's various protections arise only if the contract in question is a "viatical settlement contract," which in turn depends on whether the purchasing party is a "viatical settlement provider." The parties' dispute therefore focuses on the definition of "viatical settlement contract" and "viatical settlement provider." The Act defines a "viatical settlement contract" as:

> A written agreement between a viator and a viatical settlement provider or any affiliate of the viatical settlement provider establishing the terms under which compensation or anything of value

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22 Miller's Deposition at 47:7-21.

23 *Id.* at 19:9-25.

> is or will be paid, which compensation or value is less than the expected death benefits of the policy, in return for the viator's present or future assignment, transfer, sale devise or bequest of the death benefit or ownership of any portion of the insurance policy or certificate of insurance.

Id. § 33-13C-2(13)(A). A "viator" is "the owner of a life insurance policy or a certificate holder under a group policy who resides in this state and enters or seeks to enter into a viatical settlement contract." *Id.* § 33-13C-2(17)(A). A "viatical settlement provider" means "a person, other than a viator, that enters into or effectuates a viatical settlement contract with a viator resident in this state." *Id.* § 33-13C-2(14)(A). Importantly to this case, the statute excludes from the definition of "viatical settlement provider" any "individual who enters into or effectuates no more than one viatical settlement contract in a calendar year for the transfer of life insurance policies for value less than the expected death benefit." *Id.* § 33-13C-2(14)(B)(iv).

2. Miller Is a Viatical Settlement Provider

Plaintiffs contend Miller was not a viatical settlement provider when he entered into the SFA and, thus, the SFA is not a viatical settlement contract. Plaintiffs contend that Miller is excepted from the Act as an "individual who enters or effectuates no more than one viatical settlement contract in a calendar year," referred to here as the "once-a-year exception." *See id.* § 33-13C-2(14)(B)(iv). Plaintiffs first argue that in calendar years 2013 and 2014, Miller *personally* entered into only one viatical settlement—that is, the SFA with Mr. Short.[24] While Miller's job as director of underwriting at Montage involved buying viatical settlements on Montage's behalf,[25] Miller did not personally enter into those

[24] Miller's Declaration ¶¶ 4, 7.

[25] Miller's Deposition at 9:16-24.

viatical settlements and has no ownership interest in Montage.[26] Plaintiffs next argues that the Act excepts from the definition of "viatical settlement provider" any individual who enters into or effectuates no more than one viatical settlement contract with a *West Virginia* viator during the calendar year. Miller testified that in 2013 and 2014, he entered into or effectuated only one viatical settlement contract with a West Virginia resident—*i.e.*, the SFA with Mr. Short.

The Court is unpersuaded by Plaintiffs' arguments. Miller was a viatical settlement provider when he contracted with Mr. Short and entered into the SFA and the once-a-year exception is inapplicable. With respect to Plaintiffs' first argument, the once-a-year exception applies only to individuals who "enter[] into *or* effectuate[] no more than one viatical settlement contract in a calendar year." *See id.* § 33-13C-2(14)(B)(iv) (emphasis added). Although Miller personally entered into only one such contract in 2013 and 2014, his uncontroverted testimony is that he was involved, through Montage, in approximately 75 viatical settlements in 2014 and a "bit less" in 2013.[27] Accordingly, Miller effectuated—or acted "to bring about," *see effectuate*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011)—far more than one viatical settlement contract during each calendar year 2013 and 2014. Plaintiffs' reading is unpersuasive. The statute excepts from coverage persons who neither enter into more than one viatical settlement contract nor effectuate more than one such contract in a year. A person must meet both conditions to be excluded from the Act's scope. Plaintiffs' focus on "enters into" reads "effectuates" out of the statute. *See T. Weston, Inc. v. Mineral County*, 638 S.E.2d 167, 171 (W. Va. 2006) ("A cardinal rule of statutory

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26 Miller's Declaration ¶ 2.

27 Miller's Deposition at 13:8-25.

construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute."). Moreover, Plaintiffs' interpretation would permit entities that routinely purchase life insurance policies to subvert the Act's protections by creating "one-off" legal entities for the sole purpose of entering into a single viatical settlement. *See State ex rel. Rubenstein v. Bloom*, 771 S.E.2d 717, 722 (W. Va. 2015) ("Effect should be given to the spirit, purpose and intent of the lawmakers without limiting the interpretation in such a manner as to defeat the underlying purpose of the statute.").

Plaintiffs' next argument—that the once-a-year exception applies to persons who regularly enter into or effectuate viatical settlement contracts so long as they contract with only a single West Virginia resident in a calendar year—is also unpersuasive. While West Virginia's definition of "viatical settlement provider" applies to any person who contracts with a West Virginia resident, *see* W. VA. CODE § 33-13C-2(14)(A), the once-a-year exception to this general rule, *see id.* § 33-13C-2(14)(B)(iv), contains no West Virginia resident limitation. The exception only covers "an individual who enters into or effectuates no more than one viatical settlement contract in a calendar year," without regard to the viator's state of residence. *See id.* Consequently, Plaintiffs' interpretation of the once-a-year exception is unpersuasive and the exception does not avail Plaintiffs.

Because Miller qualifies as a viatical settlement provider, the Act's protections apply in this case. No genuine dispute exists that Miller failed to adhere to the Act's protections—*i.e.*, the approval, disclosure, and licensure requirements. This failure renders void the SFA, through which Plaintiffs' trace their interest in Mr. Short's Sun Life Policy benefits.

3. The SFA Is a Viatical Settlement Contract

Alternatively, even if Miller were not a viatical settlement provider, the SFA nevertheless qualifies as a viatical settlement contract and is therefore void because

it was not preapproved by the West Virginia Insurance Commissioner. *See id.* § 33-13C-5(a). The definition of "viatical settlement contract" includes "[a] written agreement between a viator and a viatical settlement provider *or any affiliate of the viatical settlement provider* . . . ." *See id.* § 33-13C-2(13)(A) (emphasis added). Even if Miller does not qualify as a "viatical settlement provider," his employment by Montage, for which he regularly purchased viatical settlements, renders him an "affiliate of [a] viatical settlement provider." *See id.* Accordingly, the SFA qualifies as a viatical settlement contract and is void because Miller failed to satisfy Viatical Settlement Act's preapproval requirements.

B. The SFA Does Not Cover Replacement Policies

Mrs. Short contends that even if the SFA is valid, it only assigned Mr. Short's interest in the Cigna Policy and not his interest in any replacement policy. Plaintiffs respond that the SFA is ambiguous on this point and matters extrinsic to the SFA demonstrate the parties intended for the SFA to cover replacement policies. The Court is persuaded by Mrs. Short's position. The SFA unambiguously covers only the Cigna Policy and does not cover replacement policies.

1. West Virginia Contract Construction

By its terms, the SFA is governed by the laws of West Virginia.[28] Under West Virginia law, "[t]he question as to whether a contract is ambiguous is a question of law to be determined by the court." *Dan's Carworld, LLC v. Serian*, 482, 677 S.E.2d 914, 918 (W. Va. 2009) (alteration in original) (quoting *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of Am.*, 162 S.E.2d 189, 200 (W. Va. 1968)). "[W]here the terms of a contract are clear and unambiguous, they must be applied

28 SFA ¶ 6.

and not construed." *Waddy v. Riggleman*, 606 S.E.2d 222, 233 (W. Va. 2004). "When a written contract is clear and unambiguous its meaning and legal effect must be determined solely from its contents and it will be given full force and effect according to its plain terms and provisions. Extrinsic evidence of the parties to such contract, or of other persons, as to its meaning and effect will not be considered." *Dan's Carworld*, 677 S.E.2d at 919 (quoting *Kanawha Banking & Tr. Co. v. Gilbert*, 46 S.E.2d 225, 227 (W. Va. 1947)). "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous." *Energy Dev. Corp. v. Moss*, 591 S.E.2d 135, 143 (W. Va. 2003) (quoting *Berkeley County Pub.*, 162 S.E.2d at 200).

2. Mr. Short Only Assigned His Interest in the Cigna Policy

Under the SFA's clear terms, Mr. Short only agreed to assign his interest in the Cigna Policy, not any replacement policy. The SFA states the basic terms of the agreement as follows: "[T]he parties agree to have Derek Miller facilitate the purchase, sale and assignment of [Mr. Short's] entire interest in the Policy and its benefits."[29] "Policy" is defined by the SFA as "group life insurance policy number FLX-965096, issued by Life Insurance Company of North America – CIGNA."[30] Plaintiffs cite no provision of the SFA suggesting the parties intended to transfer more than Mr. Short's interest in the Cigna Policy. The Court's examination of the SFA reveals no terms which insert uncertainty as to whether the parties intended a broader transfer. The SFA unambiguously transfers only Mr. Short's interest in the Cigna Policy.

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29 SFA at 1.

30 *Id.*

Plaintiffs contend that extrinsic evidence demonstrates that the parties intended for Mr. Short to transfer his interest in the Cigna Policy as well as his interest in future replacement policies. To demonstrate the relevance of this extrinsic evidence in the face of the SFA's unambiguous language, Plaintiffs contend the SFA is latently ambiguous. "[A] document that may appear on its face to be free from ambiguity, may be deemed latently ambiguous." *Energy Dev. Corp. v. Moss*, 591 S.E.2d 135, 143 (W. Va. 2003). For their argument here, Plaintiffs rely on general language in two West Virginia cases. Specifically, a latent ambiguity "may be created by intrinsic factors or extraneous evidence." *Kopf v. Lacey*, 540 S.E.2d 170, 175 (W. Va. 2000). "A latent ambiguity arises when the instrument upon its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain." *Flanagan v. Stalnaker*, 607 S.E.2d 765, 769 n.4 (W. Va. 2004).

The Court is unpersuaded that the SFA is latently ambiguous. The record evidence demonstrates that Miller knew at the time he entered the SFA that the Cigna Policy was a group policy susceptible to replacement by SMC.[31] That Miller was aware of the possibility of replacement, yet only explicitly contracted for a transfer of the Cigna Policy, demonstrates replacement policies were not an unanticipated collateral matter. Rather, the possibility of there being a replacement policy was a risk to Miller, and any subsequent purchaser, that the SFA did not eliminate. The fact that the plain language of the SFA does not insulate Plaintiffs from all risks and, in this case, prevents Plaintiffs from recouping their investment does not warrant an expansion of the SFA's explicit scope. As Miller acknowledged, the purchase of the Cigna Policy involved a substantial degree of

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31 Miller's Declaration ¶ 8.

risk.[32] "Just because the investors may have lost their investment in this case does not mean that this Court should rewrite the terms of the assignment to ensure that they would collect under any conceivable circumstance." *See Livoti v. Aycock*, 590 S.E.2d 159, 166-67 (Ga. App. 2003) (concluding viatical settlement agreement that did not specifically mention replacement policies did not cover replacement policies).

Plaintiffs contend that several Cigna instruments titled Absolute Assignment of Life Insurance ("Absolute Assignment") demonstrate the parties' intended to transfer replacement policies. The Absolute Assignment is a document distinct from the SFA. The Absolute Assignment effectuates an assignment when properly filled out and delivered. The Absolute Assignment states that the assignor grants the assignee his or her interest in the Cigna Policy and "any Group Policy in replacement thereof."[33]

The Court is unpersuaded by Plaintiffs' argument. The Absolute Assignment could not, by itself, effect a transfer of replacement policies because the copies Plaintiffs present are defective in several respects. The Absolute Assignment states that it must be signed and submitted to Cigna in order for it to be acknowledged.[34] Miller, however, never signed the Absolute Assignment and there is no cited evidence or testimony in the record that the Absolute Assignment

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32 *See* Miller's Deposition at 32:13-24.

33 Absolute Assignment of Life Insurance ("Absolute Assignment") [Doc. # 38-1], at 1.

34 *Id.* at 3.

was sent to Cigna. Moreover, the Absolute Assignment form before the Court actually lists *Mr. Short* as the assignee.[35]

Plaintiffs next contend the parties' course of dealing demonstrates the parties intended for the SFA to cover replacement policies. Plaintiffs cite emails between Mrs. Short and Spalding where Mrs. Short requests Spalding reimburse life insurance premiums *after* the Cigna Policy lapsed.[36] Plaintiffs further cite a string of emails, contending Mrs. Short appears to acknowledge that CWM and Spalding own the Sun Life Policy.[37] Plaintiffs contend Mrs. Short's acceptance of CWM's premium reimbursements reflect a shared understanding that the SFA covered replacement policies.[38]

The Court is not persuaded. "[W]here uncertainty or ambiguity exists regarding the construction of the terms used in a written instrument, evidence of custom or usage may be considered." *W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co.*, 766 S.E.2d 416, 432 (W. Va. 2014). Indeed, the "uniform conduct or practice of the parties under a contract is a consideration of much importance in

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35 *Id.* Even if the Absolute Assignment forms in the record have relevance for interpreting the meaning of the SFA, the partially incomplete forms suggest that the SFA in issue does *not* cover replacement policies. The Absolute Assignment forms' explicit coverage of future replacement policies contrasts with the SFA, which omits reference to replacement policies.

36 Email dated January 9, 2018, from Rhonda Short to Rick Johnson [Doc. # 36-2] (ECF 5).

37 Email dated May 16, 2018, from Rhonda Short to John Spalding [Doc. # 36-2] (ECF 28) ("I was wondering if you would consider me buying it back from you?").

38 Plaintiffs do not assert that Mrs. Short is estopped from asserting a different interpretation of the SFA because she accepted Spalding's payment of premiums. Any such argument is therefore forfeited.

ascertaining its meaning." *Annon v. Lucas*, 185 S.E.2d 343, 348 (W. Va. 1971). However, "[t]he rule relating to practical construction of provisions of a written instrument by the conduct of the parties thereto, like other rules of construction, may be resorted to by a court only when the parties have failed to express their intent in clear and unambiguous language." *Bruce McDonald Holding Co. v. Addington, Inc.*, 825 S.E.2d 779, 785 (W. Va. 2019) (quoting *Cotiga Dev. Co. v. United Fuel Gas Co.*, 128 S.E.2d 626, 628 (W. Va. 1962)).

The language of the SFA unambiguously covers only the Cigna Policy. There is no mention of replacement policies. Accordingly, the Court may not consider the parties' "practical construction" of the SFA. *See Bruce McDonald*, 825 S.E.2d at 785. Plaintiffs also do not introduce evidence of the *contracting* parties' practical construction of the SFA. Plaintiffs rely on emails, letters, and text messages exchanged between Spalding and Rhonda Short in 2017 and 2018. These materials are not probative of the intention of the contracting parties, Mr. Short and Miller, in 2014 when they signed the SFA. *See Orgill, Inc. v. Distribs. Ctrs. of Am. (WV), LLC*, 290 F. Supp. 3d 550, 554 (N.D. W. Va. 2017) ("Ultimately, the resolution will typically turn on the parties' intent at the time of contracting." (quoting *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 468 S.E.2d 712, 716 n.7 (1996))).

Even if the Court considers Mrs. Short and Spalding's practical construction of the SFA, their conduct does not demonstrate any mutual understanding that the SFA covered replacement policies. After the Sun Life Policy went into effect in June 2017, Mr. Short named Mrs. Short as a beneficiary on the Policy.[39] Spalding

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39 Sun Life Assurance Company of Canada, Beneficiary Designation [Doc. # 1-6].

emailed Mrs. Short, requesting the Shorts cease and desist.[40] Spalding asserted that the Shorts "signed away [their] interests in the group policy or any policy replacing it."[41] Mrs. Short responded that Mr. Short sold only the Cigna Policy, and not any replacement policies.[42] Mrs. Short followed up, writing "You bought one specific policy and one policy only[,] CIGNA. Anything that is not CIGNA is not yours . . . ."[43] When the communications are viewed in their entirety, Mrs. Short and Spalding's emails do not evince a shared understanding of the scope of the SFA and cannot overcome the SFA's unambiguous language.[44]

Plaintiffs' interpretation of the SFA—that it covers replacement policies—is inconsistent with the unambiguous language of the SFA and is not supported by legal authority under the circumstances at bar.[45]

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40 Email dated June 22, 2017, from John Spalding to Rhonda Short [Doc. # 36-1] (ECF 39).

41 *Id.* (ECF 40).

42 Email dated June 22, 2017, from Rhonda Short to John Spalding [Doc. # 36-1] (ECF 38).

43 Email dated June 23, 2017 from Rhonda Short to John Spalding [Doc. # 36-1] (ECF 38).

44 Plaintiffs argue that under the Sun Life Policy, Sun Life must honor the prior assignment of the Cigna Policy. Plaintiffs cite the Sun Life Policy's statement that, "We will honor your prior assignment of rights and benefits under the Employer's Plan whether or not this Policy is specified in the Assignment." The Court is unpersuaded. While Sun Life's Policy requires it to "honor" the terms of parties' agreement to transfer replacement policies, Sun Life's Policy cannot expand the scope of the parties' agreement to reach replacement policies.

45 The only authority the Court has located that construes a viatical settlement to cover replacement group policies is not controlling, is distinguishable, and is unpersuasive. *See Cunningham v. Guardian Life Ins. Co. of Am.*, No. Civ.A. 99-337, 2000 WL 1820080, at *3-4 (E.D. Ky. Sept. 26, 2000). In *Cunningham*, the viator assigned his employer's group life insurance policy shortly before the (continued…)

IV. CONCLUSION AND ORDER

The SFA, through which Plaintiffs trace their interest in Mr. Short's benefits under the Sun Life Policy, is void and unenforceable under West Virginia law. Moreover, if the SFA is valid, it unambiguously transfers *only* Mr. Short's interest in the Cigna Policy and not his interest in replacement policies. It is therefore

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(continued…)
employer changed group insurance carriers. *Id.* at *2. There, the viator was informed of the employer's impending shift in carriers *before* he accepted full payment for the assignment of prior group policy. *Id.* The Court concluded the viatical settlement covered replacement policies because the "switch . . . was simply a change in underwriters," and the "'seamless replacement' resulted in a continuation of life insurance benefits from [the employer's] employee benefit plan." *Id.* at *4.

Unlike in *Cunningham*, the undisputed record evidence is that the Cigna Policy was cancelled by SMC and the Sun Life Policy effected a net increase in employee benefits. *See* Email dated June 22, 2017, from Rhonda Short to John Spalding [Doc. # 36-1]; Letter from Sun Life Financial Re: Group Life Insurance Coverage: James M. Short [Doc. # 1-7] (ECF 3). Thus, unlike the replacement policy in *Cunningham*, the Sun Life Policy was not a "mere continuation" of the life insurance benefits under the Cigna Policy. *See* 2000 WL 1820080, at *4. Moreover, unlike the viator in *Cunningham*, who accepted payment for his assignment after he learned of his employer's impending shift in group insurer, no record evidence in this case suggests Mr. Short was aware of an impending shift in group carrier when he entered into the SFA and accepted payment.

Moreover, the reasoning in *Cunningham* has been criticized by at least one court. *See Livoti*, 590 S.E.2d at 167 ("[T]he decision is not based on any apparent legal principle."). The only legal authority the *Cunningham* court cited was *American National Bank & Trust Co. v. United States*. *See* 832 F.2d 1032, 1033-34 (7th Cir. 1987). In *American National*, the Seventh Circuit held that a policy assignment did *not* cover a subsequent replacement policy. *See id.* There, the Circuit construed assignment language much broader than that used in the SFA ("all proceeds thereof and benefits, claims, and advantages whatsoever, now due or hereafter to arise or to be had or made by virtue thereof") and concluded that it did *not* cover replacement policies. *See id.*

ORDERED that Defendant Rhonda Short's Motion for Summary Judgment [Doc. # 35] is **GRANTED**. Plaintiffs Consolidated Wealth Management, LLC, and John Spalding's claims are **DISMISSED with prejudice**. It is further

ORDERED that the Registry of Court disburse all funds held in this matter to counsel for Defendant Rhonda Short for her use and benefit.

A final, appealable judgment will issue separately.

SIGNED at Houston, Texas, this 18th day of **October, 2019.**

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE