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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

TODD F. STEVENSON, an individual on behalf of himself, and as grantor of the Todd Stevenson 2013 Irrevocable Family Trust and the Todd F. Stevenson Irrevocable Life Insurance Trust; TERRI L. STEVENSON, an individual on behalf of herself, and as grantor of the Terri L. Stevenson 2016 Irrevocable Family Trust; TODD J. STEVENSON, an individual; and JOSEPH D. STEVENSON, an individual on behalf of himself, and as grantor of the Joseph D. Stevenson Irrevocable Life Insurance Trust; JANETTE KRUTZFELDT JONES, on behalf of and as trustee for the Todd Stevenson

Case No.: 9:24-cv-00109-DLC

**DEFENDANTS SUMMIT
FINANCIAL GROUP; GP
CAPITAL PARTNERS LLC; AND
JOSHUA Q. GARDNER'S
MEMORANDUM OF LAW IN
SUPPORT OF THEIR MOTION
TO DISMISS PLAINTIFFS'
SECOND AMENDED
COMPLAINT PURSUANT TO
FED. R. CIV. P. 12(b)(6)**

2013 Irrevocable Family Trust, the Todd F. Stevenson Irrevocable Life Insurance Trust, the Terri L. Stevenson 2016 Irrevocable Family Trust, and Joseph D. Stevenson Irrevocable Life Insurance Trust; and STEVENSON AND SONS FUNERAL HOMES,

Plaintiffs,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY; THE PENN MUTUAL LIFE INSURANCE COMPANY; THE PENN INSURANCE AND ANNUITY COMPANY; SUMMIT FINANCIAL GROUP; GP CAPITAL PARTNERS LLC; THE BURGESS GROUP, INC.; JOSHUA Q. GARDNER, an individual; LAKE FOREST BANK & TRUST CO., N.A.; SUCCESSION CAPITAL ALLIANCE; and JOHN DOES 1—5,

Defendants.

Come now Defendants Summit Financial Group (“Summit”), GP Capital Partners LLC (“GP”), and Joshua Q. Gardner (“Gardner”) (collectively, the “Gardner Defendants”), by and through their counsel of record, and file the below Memorandum of Law in Support of their Motion to Dismiss the Second Amended Complaint of Plaintiffs Todd F. Stevenson, Terri L. Stevenson, Todd J. Stevenson, Joseph D. Stevenson, Janette Krutzfeldt Jones, and Stevenson and Sons Funeral

Homes (collectively, the “Plaintiffs”) for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

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I. INTRODUCTION

Plaintiffs allege 12 counts against the Gardner Defendants: (1) ordinary and professional negligence; (2) negligent misrepresentation; (3) breach of fiduciary duty; (4) statutory violations; (5) negligence *per se*; (6) constructive fraud; (7) actual fraud; (8) fraudulent inducement; (9) unjust enrichment; (10) punitive damages; (11) rescission and restitution; and (12) for an accounting.

First, any alleged claims by the Plaintiffs against the Gardner Defendants are barred by applicable and respective statutes of limitations.

Second, the gravamen of Plaintiffs' Second Amended Complaint ("SAC") is the wrongful contention that the Gardner Defendants owed Plaintiffs some duty beyond that prescribed by law, and that the Gardner Defendants made misrepresentations during the procurement of life insurance policies for Plaintiffs. The problem, however, is that "an insurance agent's duty is one of ordinary care." *Pedersen v. State Farm Mut. Auto. Ins. Co.*, 2022 U.S. Dist. (MT 2022). "The insurance agent's duty is to obtain insurance coverage 'which an insured directs that agent to procure.'" *Id.*

Third, Plaintiffs' new and additional allegations in the SAC run afoul with the Sham Pleading Doctrine. Moreover, the new and additional allegations were not previously authorized by the Joint Stipulation between the Plaintiffs and the Gardner Defendants – that any amendment to the First Amended Complaint were to be

directed solely at amplifying and clarifying claims as against Defendants Lake Forest Bank & Trust Co., N.A., and Succession Capital Alliance. Plaintiffs impermissibly added a litany of new allegations which affect and/or alter Plaintiffs' claims against the Gardner Defendants. Most notably, Plaintiffs First Amended Complaint alleged that disclosures were not made regarding the risks associated with premium financing. The SAC now contends that although disclosures were made, those disclosures were not good enough and that the Gardner Defendants explained the risks away.

Each of Plaintiffs' counts against the Defendants rely on and arise out of insurance policies which Plaintiffs failed to attach to their SAC. These documents establish that Plaintiffs were repeatedly advised – and acknowledged – the significant risks associated with premium-financed life insurance, contradicting any allegations of fraud and misrepresentation.

In its simplest form, this case involves the Stevenson Family – a family of savvy business-people and their attorney Janette Jones – who procured life insurance policies through Defendant Joshua Q. Gardner, which Plaintiffs purchased using premium financing. After being fully advised and disclosed of the risks and fluctuating nature of premium financing, Plaintiffs chose to finance the premiums of their respective policies.

During a period when interest rates were low, Plaintiffs reaped the benefits of their life insurance policy premiums being satisfied through the premium financing structure. When interest rates rose – an event that Plaintiffs were advised and acknowledged may occur – the life insurance policies could no longer pay for themselves as they previously did, and Plaintiffs soured on their decision to finance their policy premiums.

Plaintiffs now bring the instant litigation, dramatizing the role that the Gardner Defendants played in procuring Plaintiffs' requested life insurance policies. At all relevant times, Plaintiffs – including their attorney – were fully advised, aware of, and acknowledged, the risks associated with premium financing. Plaintiffs, in accord with their acute business acumen, weighed the risks and benefits of premium financing and made the decision to purchase the same. Plaintiffs cannot, and the law does not provide them with an avenue to, point their fingers at the Gardner Defendants in an attempt to escape their financial responsibilities.

The SAC fails to state a claim upon which this Court may grant relief against the Gardner Defendants. As such, the Gardner Defendants respectfully request the Court dismiss all counts alleged by Plaintiffs and deny Plaintiffs' Prayer for Relief against the Gardner Defendants.

II. ALLEGATIONS IN THE SECOND AMENDED COMPLAINT

The SAC contends that the Gardner Defendants “disguised the dangerous premium financed life insurance structure as a stable, safe, and tax-friendly estate and retirement planning tool.” (SAC at p. 4.) Plaintiffs contend that the Gardner Defendants “masked the tripartite structure as safe, stable, and secure enough to withstand the winds of changing interest rate environments.” *Id.* at p. 5.

Plaintiffs contend that the “premium financed structure was pushed on Plaintiffs... because the paradigm afforded Defendants the otherwise unavailable opportunity to procure and sell the largest policies and earn the largest commissions.” *Id.* at p. 6.

Plaintiffs allege that “over the course of a decade of more, Gardner Defendants fostered and developed an exclusive relationship with the Stevenson Family... in their financial, estate, and retirements planning affairs” and that the Gardner Defendants “held themselves out to the Stevenson Family as competent, professional experts in a wide variety of complex financial fields, including insurance, estate planning, and retirement planning.” *Id.* at ¶¶ 31-32. Plaintiffs further contend that the “Gardner Defendants assured the Stevenson Family that Gardner Defendants had the skill, expertise, and knowledge to... plan the Stevenson Family’s low-risk estate and retirement goals by way of premium financed life insurance.” *Id.* at ¶ 34.

Plaintiffs further contend that the Gardner Defendants were authorized by the co-defendants to prepare and pitch their life insurance products to Plaintiffs and that the Gardner Defendants “bottlenecked” communication and information between Plaintiffs and co-defendants. *Id.* ¶¶ 38-53. Plaintiff further allege that the Gardner Defendants “not just as the Stevenson Family’s insurance agents, but also their financial advisors and retirement and estate planners [...]” *Id.* at ¶60.

The SAC alleges that Plaintiffs were financially secure until the Gardner Defendants “pulled the Stevenson Family into the complex, high-risk, and volatile structure of premium financed life insurance, selling the structure as low-risk, suitable, and stable for the Stevenson Family’s stated estate and retirement planning goals.” *Id.* at ¶90.

Plaintiffs contend that the Stevenson Family “conveyed to the Gardner Defendants they were risk-averse, at least with respect to retirement and estate planning” and that they were “not seeking a complex, high-risk investment scheme.” *Id.* at ¶¶98-101. Plaintiffs contend that the Gardner Defendants “recommended the premium financed life insurance structure as the sole, suitable, and stable option for the Stevenson Family’s risk-averse goals.” *Id.* ¶102.

Plaintiffs contend that the Gardner Defendants’ misrepresentations began right away, “as evidenced by a 2014 email to Ms. Jones and Todd, wherein Gardner Defendants stated that the Stevenson Family could surrender the Mass Mutual

policies and walk away right then with ‘\$10 Million of cash.’” *Id.* ¶ 121.¹ Plaintiffs contend that they purchased their respective policies “relying on evaluations, recommendations, assurances, illustrations, projections, and instructions Gardner Defendants provided and presented to them” and that “Defendants failed to appropriately analyze and consider the suitability and size of the death benefits under the Life Insurance Policies [...]” *Id.* ¶¶ 136-137.

Plaintiff contend that “Gardner Defendants omitted or misrepresented information about the high-risk, highly complex nature of funding the Life Insurance Policies through premium financing [...]” *Id.* ¶ 141. Plaintiffs contend that the illustrations provided to them by the Lender Defendants through the Gardner Defendants should have illustrated the consequences of interest rates rising above 5%. *Id.* ¶ 165.

Plaintiffs contend that “[h]ad the Defendants... recommended a suitable, stable lower-priced term life insurance... and arranged for the family’s initial resources to be invested by a reasonably prudent investment professional, the Stevenson Family’s financial situation would have benefited substantially” and that

¹ Plaintiffs purposefully misrepresent the email communication they attach to the SAC. Specifically, the Gardner Defendants stated **in boldface font** that “**at age 80...** the loan balance would be approx. \$18.8M and the gross death benefit is over \$38M, for a net \$20M to the trust. The gross cash value at this point is over \$28M so if you wanted to surrender the policy and walk away you would leave with \$10M of cash...” *Id.* ¶ 121. Plaintiffs’ allegations clearly conflict with the clear and unambiguous statement made by the Gardner Defendants.

“[b]y failing to identify and recommend this less risky alternative, Defendants deprived the Stevenson Family of the opportunity to obtain significant savings and a more stable financial outcome.” *Id.* ¶¶ 213-215.

Plaintiffs further argue that “Defendants omitted and misrepresented material information to lead the Stevenson Family to reasonably believe that financing the premiums on the Life Insurance Policies was a low-risk, stable, and suitable method for the Stevenson Family’s non-complex retirement and estate goals – funding grandkids; educations and giving to their church.” *Id.* ¶224. Plaintiffs contend (even though they signed countless disclosures and acknowledgements, in the presence of their attorney(s) and advisors) that “Defendants did not make these risks apparent to the Stevenson Family in any way, nor were the risks apparent from the face of the Life Insurance Policies themselves, nor were the risks apparent from the materials Lender Defendants provided to Gardner Defendants to present to the Stevenson Family” and that “the material risks were specifically omitted from the illustrations and schedules provided to the Stevenson Family.” *Id.* ¶225.

Surprisingly, Plaintiffs also make the bold contention that the alleged misrepresentations and omissions “about the consequences of a rising interest rate environment do not necessarily conflict with the vague policy language and loan illustrations and schedule disclaimers... such that the risks were apparent from any written document.” *Id.* ¶ 226. Plaintiffs contend that they “did not know and could

not have known that Defendants failed to competently and appropriately advise them.” *Id.* ¶232.

III. LEGAL STANDARDS

Pursuant to Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief can be granted against that defendant. A motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Because Rule 12(b)(6) focuses on the “sufficiency” of a claim – and not the claim’s substantive merits – “a court may [typically] look only at the face of the complaint to decide a motion to dismiss.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). A court may, however, apply the doctrine of “incorporation by reference” to consider documents that were referenced extensively in the complaint and were accepted by all parties as authentic. *See In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999). “Under the ‘incorporation by reference’ rule of this Circuit, a court may look beyond the pleadings without converting the Rule 12(b)(6) motion into one for summary judgment.” *Van Buskirk*, 284 F.3d at 980. Specifically, a court may consider evidence outside the pleadings if the complaint ‘necessarily relies’ on that evidence. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

A motion to dismiss should be granted if plaintiff fails to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974 (2007). Dismissal may be based on the lack of a cognizable legal theory, or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (holding that on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”). Likewise, the court need not accept as true allegations that are conclusory, legal conclusions, unwarranted deductions of fact or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755-55 (9th Cir. 1994). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000); *Swartz v. KPMG LLP*, 476 F.3d 756, 756, 760 (9th Cir. 2007) (“[d]ismissal without leave to amend is proper only if it is clear . . . that the [claims] could not be saved by any amendment.”).

IV. LEGAL ARGUMENT

Plaintiffs allege 12 counts against the Gardner Defendants: (1) ordinary and professional negligence; (2) negligent misrepresentation; (3) breach of fiduciary duty; (4) statutory violations; (5) negligence *per se*; (6) constructive fraud; (7) actual fraud; (8) fraudulent inducement; (9) unjust enrichment; (10) punitive damages; (11) rescission and restitution; and (12) accounting.

A. Plaintiffs' Allegations Directly Conflict with Signed Life Insurance and Premium-Financing Documents

“Where the alleged misrepresentation contradicts a subsequent written contract . . . reliance upon the [alleged] fraudulent representation is unreasonable as a matter of law. Indeed, an insured is charged to learn and know the contents of an insurance policy.” *Milazzo v. First Liberty Ins. Corp.*, 2022 U.S. Dist. LEXIS 107034 (M.D. Fla. June 15, 2022) (internal quotations and citations omitted) (Defendants’ motion to dismiss granted and first amended complaint dismissed with prejudice where, among other things, Plaintiff’s reliance on alleged misrepresentation unreasonable as a matter of law where oral representations conflicted with terms of subsequent policy.)

Plaintiffs’ allegations directly conflict with the life insurance and premium financing documents, including illustrations, disclosures, and acknowledgments that

Plaintiffs, including their attorney Janette Krutzfeldt Jones, personally reviewed and signed, attached hereto as Exhibits A – B.

Exhibit A-1 and **Exhibit A-2** are Mass Mutual Whole Life Legacy 10 Pay Insurance Illustrations dated August 18 and 19, 2014, respectively, and signed by Plaintiff Jannete Krutzfeldt (the Stevenson family’s attorney) as Trustee, and provides, in bold-face type, that “Dividends are not guaranteed and are subject to significant fluctuations over the lifetime of the policy. Changes in dividends will change all Non-Guaranteed values shown in this illustration” and that “[t]his illustration assumes that the currently illustrated non-guaranteed elements will continue unchanged for all years shown. This is not likely to occur, and actual results may be more or less favorable than those shown.” *See* Exhibit A-1, pp. 2, 8, 9, 11, 12, and 13; *see also* Exhibit B-2, pp. 2, 8, 9, 11, 12, and 13.

The Illustrations further provide that “[i]t is designed to help you understand how this policy works. It is not a projection of how it will perform.” *See* Exhibit A-1, p. 3; *see also* Exhibit A-2, p. 3. The illustrations contain a “Revised Numeric Summary and Signature Page” signed by Plaintiff Jannete Krutzfeldt (the Stevenson family’s attorney) as Trustee, providing that she “received a copy of this illustration and understand that any non-guaranteed elements illustrated are subject to significant fluctuations and could be either higher or lower. The agent has told me they are not guaranteed.” *See* Exhibit A-1, p. 8; *see also* Exhibit A-2, p. 8.

Exhibit A-3 is a Mass Mutual Life Insurance Policy date October 12, 2017, and signed by Plaintiff Todd J. Stevenson. The premium finance disclosures therein advise that “Financing a policy carries risk. Dividends are not guaranteed and may change over the life of the policy... Substantial additional cash may be required to repay or reduce both the financing loan and the policy loan in the future to keep the policy in force.” *See* Exhibit A-3, p. 24. Exhibit A-3 further states that “[d]ividends are not guaranteed and are subject to significant fluctuations over the lifetime of the policy. Changes in dividends will change all Non-Guaranteed values in this illustration.” *See* Exhibit A-3, pp. 32, and 38. Plaintiff acknowledged that he read the disclosures and understood the implications of financing the premium.

Exhibit A-4 is a Whole Life Legacy 10 Pay with Supplement Rider for Plaintiff Terri L. Stevenson dated January 23, 2017, and signed by Terri and Jannete Krutzfeldt as Trustee. Exhibit A-4 contains similar, if not identical, language as Exhibits A-1 and A-2. *See* Exhibit A-4, pp.4, 5, and 9.

Exhibit B-1 is a Penn Mutual Guaranteed Choice Whole Life prepared for Plaintiff Stevenson and Sons and insuring Plaintiff Joseph Stevenson, dated August 16, 2017, signed by Plaintiff Joseph Stevenson and Plaintiff Jannete Krutzfeldt as Trustee. Exhibit B-1 states, in pertinent part, that “[t]his illustration assumes that the currently illustrated non-guaranteed elements will continue unchanged for all

years shown. This is not likely to occur and actual results may be more or less favorable than those shown.” *See* Exhibit B-1, pp. 6 and 17.

Exhibit B-2 is a Penn Mutual New Business Cover Sheet Individual Premium Financing Case, including Disclosure and Acknowledgement for Plaintiff Joseph Stevenson and Plaintiff Janette Krutzfeldt, signed by them on November 28, 2017. Exhibit B-2 states, in pertinent part, that “[p]remium financing involves significant risks, including, but not limited to, changes in interest rates charged on premium financing loans, changes in collateral valuation and/or collateral requirements, and modification, nonrenewal, or termination of the loan. Illustrated policy premiums, cash values, and death benefits are hypothetical and not guaranteed, and the actual financial performance of the policy resulting from premiums paid, interest and earnings, expenses and charges, and other factors may have a negative effect on the premium financing arrangement and/or the policy.” *See* Exhibit B-2, p. 3.

Exhibit B-3 is a Penn Mutual New Business Cover Sheet Individual Premium Financing Case, including Disclosure and Acknowledgement for Plaintiff Terri L. Stevenson signed by him and Plaintiff Janette Krutzfeldt as Trustee on January 4, 2017. It contains language identical to that in Exhibit B-2. *See* Exhibit B-3, p. 3.

Exhibit B-4 is a Penn Mutual New Business Cover Sheet Individual Premium Financing Case, including Disclosure and Acknowledgement for Plaintiff Todd F. Stevenson signed by him and Plaintiff Janette Krutzfeldt Jones on November 28,

2017. It contains language identical to that in Exhibit B-2 and Exhibit B-3. *See* Exhibit B-4, p. 3.

Exhibit B-5 is a Penn Mutual Guaranteed Choice Whole Life for Steveson and Sons and as Todd F. Stevenson as insured, signed by Plaintiff Janette Krutzfeldt as Trustee, Plaintiff Josph Stevenson as Owner of Stevenson and Sons, and Todd F. Stevenson as the Insured, on January 4, 2018. It contains similar, if not identical, language as in Exhibits A-1 and A-2. *See* Exhibit B-5, pp. 4, and 15.

Exhibit B-6 is a Mass Mutual Premium Finance Supplement, Disclosure & Acknowledgement for Terri L Stevenson (\$10M) signed by him and Plaintiff Janette Krutzfeldt Jones as Trustee on January 18, 2017. It contains identical language as in Exhibit A-3. *See* Exhibit B-6, p. 2.

B. Plaintiffs' Claims Are Time Barred by the Applicable Statute of Limitations

“A statute of limitations defense may be raised in a motion to dismiss where the running of the statute is apparent from the face of the complaint.” *Mittelstaed v. State Child. & Family Servs. Div*, 2024 U.S. Dist. (D. Mont. Jan. 9, 2024) (internal citations omitted.)

1. Plaintiffs' Claims Sounding in Negligence Are Time Barred

“Negligence is subject to a three-year statute of limitations, and begins to run when all the elements of the cause of action are in existence, and the facts

For yet another example, the disclosures contained in Exhibit B-2: Penn Mutual New Business Cover Sheet Individual Premium Financing Case, including Disclosure and Acknowledgement for Plaintiff Joseph Stevenson and Plaintiff Janette Krutzfeldt, signed by them on November 28, 2017:

- 2. Premium financing involves significant financial risks, including, but not limited to, changes in interest rates charged on premium financing loans, changes in collateral valuation and/or collateral requirements, and modification, nonrenewal, or termination of the loan; and,
- 3. Illustrated policy premiums, cash values, and death benefits are hypothetical and not guaranteed, and the actual financial performance of the policy resulting from premiums paid, interest and earnings, expenses and charges, and other factors may have a negative effect on the premium financing arrangement and/or the policy; and,

<u>Joseph D Stevenson</u> Insured (Print Name)	<u>Janette Krutzfeldt Jones</u> Applicant/Owner: Print Name
<u>10 / 01 / 1957</u> Insured Date of Birth (mm/dd/yyyy)	<u><i>JK Jones</i></u> Applicant/Owner: Signature
	<u>Trustee</u> Applicant/Owner: Title
	<u>11 / 28 / 2017</u> Date (mm/dd/yyyy)

For yet another example, the disclosures contained in Exhibit B-3: Penn Mutual New Business Cover Sheet Individual Premium Financing Case, including Disclosure and Acknowledgement for Plaintiff Terri L. Stevenson signed by him and Plaintiff Janette Krutzfeldt as Trustee on January 4, 2017:

- 2. Premium financing involves significant financial risks, including, but not limited to, changes in interest rates charged on premium financing loans, changes in collateral valuation and/or collateral requirements, and modification, nonrenewal, or termination of the loan; and,
- 3. Illustrated policy premiums, cash values, and death benefits are hypothetical and not guaranteed, and the actual financial performance of the policy resulting from premiums paid, interest and earnings, expenses and charges, and other factors may have a negative effect on the premium financing arrangement and/or the policy; and,

Terri L. Stevenson
Insured (Print Name)
09 10 1959
Insured Date of Birth (mm/dd/yyyy)

Terri L. Stevenson
Applicant/Owner: Print Name
[Signature]
Applicant/Owner: Signature
Janette K. Jones
Applicant/Owner: Title
01 10 2017
Date (mm/dd/yyyy)

For yet another example, the disclosures contained in Exhibit B-4: Penn Mutual New Business Cover Sheet Individual Premium Financing Case, including Disclosure and Acknowledgement for Plaintiff Todd F. Stevenson signed by him and Plaintiff Janette Krutzfeldt on November 28, 2017:

- 2. Premium financing involves significant financial risks, including, but not limited to, changes in interest rates charged on premium financing loans, changes in collateral valuation and/or collateral requirements, and modification, nonrenewal, or termination of the loan; and,
- 3. Illustrated policy premiums, cash values, and death benefits are hypothetical and not guaranteed, and the actual financial performance of the policy resulting from premiums paid, interest and earnings, expenses and charges, and other factors may have a negative effect on the premium financing arrangement and/or the policy; and,

Todd F. Stevenson
Insured (Print Name)
12 10 1962
Insured Date of Birth (mm/dd/yyyy)

Janette Krutzfeldt Jones
Applicant/Owner: Print Name
[Signature]
Applicant/Owner: Signature
Trustee
Applicant/Owner: Title
11 28 2017
Date (mm/dd/yyyy)

Any alleged negligence should have been immediately apparent to Plaintiffs at that time. As such, Plaintiffs' claims sounding in negligence are time barred.

2. Plaintiffs' Claims Sounding in Fraud Are Time Barred

"The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within 2 years [...]." Mont. Code Ann. § 27-2-203. "[I]f the injured party has received notice of a possible claim and failed to act diligently in pursuing the claim, the claim may be time-barred." *McGowen Precision Barrels, LLC v. Proof Rsch., Inc.*, 637 F. Supp. 3d 1116, 1126 (D. Mont. 2022) (internal citations and quotations omitted.) As discussed above, any fraud alleged by Plaintiffs occurred *prior to* 2018, and Plaintiffs (including *attorney* Jones) had notice of the same when alleged misrepresentations by Gardner contradicted the illustrations (including disclosures and risks) in the policies.

As such, all of Plaintiffs' claims against the Gardner Defendants (which either sound in alleged negligence or fraud) are time barred.

C. Plaintiffs' Claims for Ordinary and Professional Negligence Fails

As a Matter of Law Because There is No Duty Advise

At bottom, Plaintiffs' allegations stem from their claim that the Gardner Defendants had some manufactured duty to advise the Stevenson Family. As solely a procuring life insurance agent, the Gardner Defendants had no such duty. "It is

well established that an insurance agent owes an absolute duty to obtain the insurance coverage which an insured directs the agent to procure.” *Monroe v. Cogswell Agency*, 134, 356 P.3d 79 (MT 2010) (internal citations omitted). “Little uncertainty exists that the Montana Supreme Court would agree that an insurance agent’s duty is one of ordinary care. The Montana Supreme Court stated plainly in *Monroe v. Cogswell Agency*, 2010 MT 134, 356 Mont. 417, 234 P.3d 79 (Mont. 2010), that the insurance agent’s duty is to obtain insurance coverage ‘which an insured directs that agent to procure.’” *Pedersen v. State Farm Mut. Auto. Ins. Co.* 2022 U.S. Dist. (MT 2022). “Thus, the scope of the agent’s duty is defined by what the insured asks the agent to do.” *Pedersen v. State Farm Mut. Auto. Ins. Co.*, 2020 U.S. Dist. (MT 2020) (internal citations omitted). An insurance agent does **not** have a general duty to determine the adequacy of an insured’s coverage or to anticipate an insured’s unspoken needs. *Polski v. Powers*, 221 N.W.2d 106, 108 (Neb. 1985) (holding “it would be an unreasonable burden to impose upon insurance agents a duty to anticipate what coverage an individual should have [...].”) Generally, insurance agents and brokers also do *not* have a duty to advise on the adequacy or sufficiency of insurance coverage. 1-2 New Appleman on Insurance Law Library Edition § 2.05(5)(a).

The gravamen of Plaintiffs’ claims is that the Gardner Defendants not only had a duty to procure Plaintiffs’ requested life insurance, but the additional and

fictitious duties to advise on the suitability and structure of, and to supervise, the premium finance structure. However, no such duty is owed as a matter of law.

Moreover, Plaintiffs' allegations that "[a]t bottom, Defendants breached their respective duties... by failing to explain and disclose the... risks associated with... premium financed life insurance" is blatantly false. Plaintiffs (including attorney Janette Krutzfeldt Jones) signed disclosures and acknowledgments which plainly make known the risks associated with premium financing. For example, one such disclosure states, superfluously, that "[f]inancing a policy carries risk. Dividends are not guaranteed and may change over the life of the policy... Substantial additional cash may be required to repay or reduce both the financing loan and the policy loan in the future to keep the policy in force." *See* Exhibit A-3, p. 24. Other documents provide that, "[p]remium financing involves significant risks, including, but not limited to, changes in interest rates charged on premium financing loans, changes in collateral valuation and/or collateral requirements, and modification, nonrenewal, or termination of the loan. Illustrated policy premiums, cash values, and death benefits are hypothetical and not guaranteed, and the actual financial performance of the policy resulting from premiums paid, interest and earnings, expenses and charges, and other factors may have a negative effect on the premium financing arrangement and/or the policy." *See* Exhibit B-2, p. 3.

In regard to the contention that Plaintiffs were not made aware of nature of premium financing, Plaintiffs can hardly argue (and it is astonishing that they do) that the risks associated with premium financing were not disclosed to them. The Stevenson Family and their attorney Janette Krutzfeldt Jones reviewed the life insurance policies, understood the risks, and signed and acknowledged the same.

For the aforementioned reasons, Plaintiffs' claims for ordinary and professional negligence against the Gardner Defendants fail as a matter of law.

D. Plaintiffs' Claim for Negligent Misrepresentation Fails As a Matter of Law Because No Representation of Past or Existing Material Fact Was Made, Reliance Was Unreasonable, and Recovery is Not Supported

“A claim for negligent misrepresentation requires the plaintiff to prove six elements: (1) the defendant made a representation as to a *past* or *existing* material fact; (2) the representation was untrue; (3) regardless of actual belief, the defendant made the representation without any reasonable ground for believing it to be true; (4) the representation was made with the intent to induce the plaintiff to rely on it; (5) the plaintiff was unaware of the falsity of the representation and justified in relying upon the representation; (6) the plaintiff, as a result of reliance, sustained damage. Additionally, negligent misrepresentation requires a showing of the failure

to exercise the care or competence of a reasonable person in obtaining or communicating information.

“Claims of fraud and grounded in fraud are subject to the heightened pleading standards of Rule 9(b) and must plead with particularity the circumstances constituting fraud or mistake. This district considers negligent misrepresentation a claim grounded in fraud. Particularity requires the plaintiff allege the who, what, when, where, and how of the misconduct charged.” *Deveraux v. Meadowlark of Billings LLC*, 2023 U.S. Dist. (MT 2023) (internal citations and quotations omitted).

1. No Representation of Past of Present Material Fact

“A misrepresentation is actionable only if it is a representation of fact rather than opinion. It is hornbook law that an actionable misrepresentation must be made about past or existing facts; statements regarding future events are merely deemed opinions. In addition, a negligent misrepresentation requires ‘a positive assertion,’ rather than ‘an omission or implied assertion or representation.” *Altaa Invs., LLC v. Prod. Capital, LLC*, U.S. Dist. (CA 2023) (internal quotations and citations omitted.)

Plaintiffs contend that the Gardner Defendants, “through a failure to exercise care and competence, misrepresented that the... premium financed insurance program was stable, suitable, and appropriate [...]” SAC at ¶ 265. Plaintiffs point to an email communication from 2014, contending that the Gardner Defendants’ statement that “**at age 80**... the loan balance would be approx. \$18.8M and the gross

death benefit is over \$38M, for a net \$20M to the trust. The gross cash value at this point is over \$28M so if you wanted to surrender the policy and walk away you would leave with \$10M of cash...” evidences a representation as to a past of existing fact. *Id.* ¶ 121. This is nonsensical. The statement starts with “at age 80” and clearly contemplated a scenario far into the future. Plaintiffs also point to another email from the Gardner Defendants where the Gardner Defendants state that Plaintiffs would save on interest over the span of a 10 year period. Again, this is clearly an opinion regarding an event that was contemplated to potentially occur in the future.

Every statement made by Gardner in his 2017 email communication were unambiguously opinions concerning the *future*, not representations of a past or existing fact. “As a general rule, a fraudulent representation must relate to a fact, not the expression of an opinion.” *H&R Block Tax Servs. LLC v. Kutzman*, 2010 U.S. Dist. (D. Mont. Apr. 21, 2010.)

2. ***Plaintiffs’ Allegations Do Not Support Recovery***

Plaintiffs contend that the Defendants’ alleged “misrepresentations and omissions increased the risk of harm to the Stevenson Family and/or reduced the Stevenson Family’s chances of obtaining a better result with stable and suitable financial products [...]” SAC at ¶ 303.

Whether Plaintiffs might have spent their money on a different insurance product or invested their money, however, does not support a theory of recovery. In

Horace Mann Life Ins. Co. v. Nunaley, Plaintiff’s “expert witness... testified that [Plaintiff’s] damages were \$ 4,156.94. [The expert] testified that [Plaintiff] was entitled to ‘lost opportunity’ damages because she could have invested the money she spent on premiums rather than pay for a policy she supposedly would not have purchased under all of the circumstances.” *Horace Mann Life Ins. Co. v. Nunaley*, 960 So. 2d 455, 461 (Miss. 2007.)

The *Nunaley* Court held that, “[Plaintiff] unquestionably fails to prove ... that she suffered damages as a direct and proximate result of such reasonable reliance on any perceived negligent misrepresentation which [Defendant] made to her. [Plaintiff], to this day, has in effect a policy that will pay ... *in the event of* the death of one of her children and she has made no claim on her insurance policy because, thankfully, neither of her children have died. The record is simply devoid of any proof that [Plaintiff] has suffered damages as a result of any negligent misrepresentation by the defendants.” *Id.* The *Nunaley* Court ultimately ruled that Nunaley could not prove the necessary element of damages in her negligent misrepresentation claim, reversed the lower court’s ruling and entered judgment in favor of the defendants.

Similarly, Plaintiffs do not contend that they have surrendered their respective life insurance policies. Rather, Plaintiffs summarily contend that the Defendants’ acts and/or omissions reduced the Stevenson Family’s “chances of obtaining a better

result.” As in *Nunaley*, this does not suffice to support a claim for damages, and Plaintiffs’ negligent misrepresentation claim therefore fails as a matter of law.

3. **Plaintiffs’ Cannot Establish Reasonable Reliance on Gardner’s Alleged Misrepresentations**

Plaintiffs contend that they relied on the Gardner Defendants’ alleged misrepresentations and omissions because they “did not run so contrary to the sweeping, boilerplate ‘risk’ disclosures in the Life Insurance Policies, and vague disclaimers in Lender Defendants’ materials [...]” SAC at ¶ 299. Plaintiffs seemingly argue that although disclosures were made about the risks associated with premium financing, they were justified in ignoring them and relying on the Defendants’ alleged misrepresentations because the disclosures were oblique and allegedly “boilerplate.”

The disclosures regarding risk were contained in nearly every document, drafted in boldface font, pronounced, and unambiguous. For example, “[p]remium financing involves significant risks, including, but not limited to, changes in interest rates charged on premium financing loans, changes in collateral valuation and/or collateral requirements, and modification, nonrenewal, or termination of the loan. Illustrated policy premiums, cash values, and death benefits are hypothetical and not guaranteed, and the actual financial performance of the policy resulting from premiums paid, interest and earnings, expenses and charges, and other factors may

have a negative effect on the premium financing arrangement and/or the policy.” See Exhibit B-2, p. 3. “[W]here the language of an agreement is clear and unambiguous, and as a result, susceptible to only one interpretation, the court's duty is to apply the language as written.” *Rich v. Ellingson*, 174 P.3d 491 (MT 2007). The Stevenson Family – a family of savvy businesspeople – and their attorney Janette Krutzfeldt Jones reviewed the life insurance policies, understood the risks, and signed and acknowledged the same.

“[T]he policy of the law is that it is unreasonable to rely on oral statements when one is in possession of written documents that would put one on notice as to the validity of oral statements. *Woodlawn Fraternal Lodge No. 525, F. & A.M. v. Commercial Union Ins. Co., O.M.*, 510 So. 2d 162, 164 (Ala. 1987.) *Woodlawn* involved alleged misrepresentations regarding the terms of a renewal insurance policy. The Court in *Woodlawn* reversed the lower court’s summary judgment in favor of defendants where it found that the diligence required of the parties to an initial contract is greater than during renewal of the same and that the burden was on the insurer to notify the insured regarding changes from the original contract. Unlike *Woodlawn*, here, Plaintiffs purchased new policies, requiring Plaintiffs’ diligence in reviewing the same.

“As the Ninth Circuit panel in *Cohen v. Wedbush* further discussed, even if an actual misrepresentation was made regarding the function or effect of the

arbitration clause, the misrepresentation could render the contract voidable only if the party had reasonably relied upon the misrepresentation. *Id.* (citing 12 S. Williston, *The Law of Contracts* § 1515B, at 485 (3d ed. 1970)). Such reliance cannot be reasonable when the party could have, ‘through the exercise of reasonable diligence, ascertained the truth of the matter.’ *Id.* There can be no unfairness in expecting Vetter to have read the contract he signed. See *id.* Furthermore, the arbitration provision was not hidden from Vetter. It was a large paragraph with a clear subheading in capital letters ("RESOLUTION OF DISPUTES - ARBITRATION") located just inches above Vetter's signature. *Snap-On Tools Corp. v. Vetter*, 838 F. Supp. 468 (D. Mont. 1993).

Even if the Gardner Defendants made representations concerning how the policies would perform or that the policies were suitable (he did not), Plaintiffs received and signed the illustrations and disclosures which outlined the risks associated with premium financing. See Exhibits A-1 – A-4, and B-1 – B-6.

Each document the Plaintiffs received, acknowledged, and signed, contained language regarding the fluctuating nature of interest rates and significant risk associated with premium financing. The documents were even acknowledged and signed by the Stevenson family lawyer, Plaintiff Janette Jones, acting as trustee. Because the aforementioned documents directly contradict any alleged misrepresentations by the Gardner Defendants, Plaintiffs’ supposed reliance was

unreasonable. *Woodlawn Fraternal Lodge No. 525, F. & A.M. v. Commercial Union Ins. Co., O.M.*, 510 So. 2d 162, 164 (Ala. 1987) (holding that it is unreasonable to rely on oral statements when in possession of written documents conflicting with the oral statements.)

E. Plaintiffs' Claim for Breach of Fiduciary Duty Fails As a Matter of Law Because Insurance Agents are Not Fiduciaries

“Little uncertainty exists that the Montana Supreme Court would agree that an insurance agent’s duty is one of ordinary care. The Montana Supreme Court stated plainly in *Monroe v. Cogswell Agency*, 2010 MT 134, 356 Mont. 417, 234 P.3d 79 (Mont. 2010), that the insurance agent’s duty is to obtain insurance coverage ‘which an insured directs that agent to procure.’” *Pedersen v. State Farm Mut. Auto. Ins. Co.* 2022 U.S. Dist. (MT 2022). Montana does not recognize a fiduciary relationship between insurance agent and a customer. *Bailey v. State Farm Mut. Auto. Ins. Co.* 300 P.3d 1149 (MT 2013.) “While the law has recognized a public interest in fostering certain professional relationships, such as the doctor-patient and attorney-client relationships, it has not recognized the insurance agent-client relationship to be of similar importance.’ Thus, the relationship between an insurance agent and an insured, without more, is not a fiduciary relationship, but an ordinary business relationship.” *Long v. Time Ins. Co.*, 572 F. Supp. 2d 907, 913-14 (S.D. Ohio 2008) (internal citations and quotations omitted.)

The Gardner Defendants did not owe Plaintiffs the fabricated duties to advise Plaintiffs and ascertain or analyze Plaintiffs' premium financing structure. The only role that the Gardner Defendants played was as the procurer of Plaintiffs' life insurance policies, which Plaintiffs chose to finance with co-defendants. At most, the Gardner Defendants owed Plaintiffs a duty to procure Plaintiffs' life insurance, which they did. To the extent that Plaintiffs contend that Gardner (the procuring life insurance agent) owed a duty to disclose the risks associated with premium financing (a duty not prescribed by law), unambiguous risk disclosures were made numerous times to Plaintiffs (including attorney Janette Krutzfeldt Jones), who acknowledged and signed the same. *See* Exhibits A-1 – A-4, and B-1 – B-6.

F. Plaintiffs' Claims for Statutory Violations of Mont. Code Ann. §§ 33-18-201, et seq., 33-14-103, et seq. and Negligence Per Se Fail As a Matter of Law Because There is No Private Right of Action

Montana Code Annotated section 33-18-202 provides standards for insurers to follow, including regulations regarding the issuance or circulation of estimates, illustrations, sales presentations, omissions, comparisons, or statements that misrepresent the terms of insurance products. Montana Code Annotated section 33-18-203 provides standards regarding the circulation and publication insurance material that is untrue, deceptive, or misleading.

Here, the Gardner Defendants did not draft any insurance product but rather presented Plaintiffs with premium-financed life insurance options after soliciting the aforementioned from Mass Mutual and Penn on behalf of Plaintiffs. Contrary to Plaintiffs' contentions, and conveniently missing from the SAC, are the insurance products themselves (including illustrations and disclosures thereto) which expressly, explicitly, and repeatedly stated that premium financing involved significant financial risk and changes in interest rates. *See* Exhibits A-1 – A-4, and B-1 – B-6.

Moreover, there is no private right of action under Montana's UTPA. In *Neumann v. Aid Ass'n for Lutherans*, the Court agreed “with the conclusion reached by Judge Battin in *Shupak* that Mont. Code Ann. §§ 33-18-202 ... do[es] not give rise to an independent cause of action. The express language of Mont. Code Ann. §§ 33-18-242 (1987) compels this conclusion.” *Neumann v. Aid Ass'n for Lutherans*, 775 F. Supp. 1350, 1353 (D. Mont. 1991.) “It is now well-settled that there is both a statutory private right of action for claims-handling disputes under section 242 of the UTPA and common law rights arising therefrom. However, there is no common law or statutory private right of action pertaining to other types of insurance disputes [...]” *Fossen v. Caring for Montanans, Inc.*, 993 F. Supp. 2d 1254, 1263 (D. Mont. 2014.) As explained above, Plaintiffs did not make (and the Gardner Defendants were not involved in) a claim for settlement under their respective life insurance

policies, related to section 33-18-201 of the Mont. Code. Ann., and the only private right of action under the Mont. Code. Ann. is for claims arising from a violation under section 33-18-201(1), (4), (5), (6), (9), or (13), none of which could reasonably apply to the Gardner Defendants.

G. Plaintiffs' Claim for Constructive Fraud Fails As a Matter of Law Because Insurance Agents are Not Fiduciaries

Plaintiffs contend that the Gardner Defendants “made material misrepresentations and omissions to the Stevenson Family about the Life Insurance Policies, including... that the premium finance structure was stable and... would perform at a certain level without explaining the substantial risks [...]” SAC at ¶ 358.

“Fraud claims are subject to a heightened pleading standard. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. The Federal Rule 9(b)’s particularity requirement applies to state-law causes of action. Federal courts examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, but apply Rule 9(b)'s requirement that the circumstances of the fraud be stated with particularity. This requirement applies not only to claims of fraud but also other claims grounded in fraud.” *Paatalo v. First Am. Title Co. of Mont., Inc.* No. CV-13-128-BLG-SEH-CSO, 2014 U.S. Dist. (MT 2014) (internal quotation marks and

citations omitted). “Claims of fraud and grounded in fraud are subject to the heightened pleading standards of Rule 9(b) and must plead with particularity the circumstances constituting fraud or mistake. *Deveraux v. Meadowlark of Billings LLC*, 2023 U.S. Dist. (MT 2023) (internal citations and quotations omitted). “Particularity requires the plaintiff allege the who, what, when, where, and how of the misconduct charged.” *Id.*

“Constructive fraud is a breach of duty which, without fraudulent intent, creates an advantage for the breaching party by misleading another person to that person's prejudice.” *Morrow v. Bank of Am., N.A.*, 117, 375 Mont. 38, 324 P.3d 1167 (MT 2014). “In order to make out a prima facie case of constructive fraud, a plaintiff must establish the following elements: a representation; the falsity of that representation; the materiality of that representation; the speaker’s knowledge of that representation’s falsity or ignorance of its truth; the hearer's ignorance of that representation’s falsity; the hearer’s reliance upon the truth of that representation; the hearer’s right to rely upon that representation; and the hearer’s consequent and proximate injury or damage caused by reliance on that representation.” *Dewey v. Stringer*, 136, 325 P.3d 1236 (MT 2014) (internal quotation marks and citations omitted.) “Constructive fraud is a breach of duty which, without fraudulent intent, creates an advantage for the breaching party by misleading another person to that

person's prejudice.” *Morrow v. Bank of Am., N.A.*, 117, 375 Mont. 38, 324 P.3d 1167 (MT 2014).

1. ***The Gardner Defendants Did Not Owe Plaintiff's Any Legally Cognizable Duty of Care***

Here, the Gardner Defendants did not breach any legally cognizable duty allegedly owed to Plaintiffs. Plaintiffs were made fully aware of all material terms of the underlying insurance policies, premium financing, and the significant risks associated therewith (as evidenced by the countless disclosures and acknowledgments shown above.) Gardner, acting as Plaintiffs' insurance agent, only owed a duty of ordinary care to Plaintiff to procure the policies requested. The Gardner Defendants did not owe Plaintiffs any alleged fiduciary duty and therefore their count for constructive fraud is without merit.

2. ***Defendants Were Not Ignorant of Any Alleged False Representations by The Gardner Defendants and Reliance Was Unreasonable***

Assuming that the Gardner Defendants made any false representations (they did not), Plaintiffs' contentions that they were “unaware of the falsity of Gardner Defendants' misrepresentations and omissions” and that they could not “have made themselves aware of the falsity based on their relative lack of informational access, knowledge, and power” is ridiculous. SAC at ¶ 374. At all relevant times, the

Stevenson Family had the advice of their counsel (Plaintiff and attorney Janette Krutzfeldt Jones), who along with the Stevenson Family reviewed, acknowledged, and signed the life insurance policies and premium finance documents, which contained countless disclosures in no ambiguous terms. *See* Exhibits A-1 – A-4, and B-1 – B-6.

The aforementioned countless disclosures were clear – that premium financed life insurance products carried risk and that results were not guaranteed. These disclosures directly contradict the alleged misrepresentations the Gardner Defendants made (they did not), and Plaintiffs were fully advised and made aware of the same. Plaintiffs attempt to explain away the disclosures, arguing that they “were sweeping, boilerplate ‘risk’ disclosures.

The law is clear, “reliance on a misrepresentation is not reasonable when the plaintiff could have, through the exercise of reasonable diligence, ascertained the truth of the matter. Requiring reasonable investigation by the party claiming fraud is particularly appropriate in cases where, as here, the explicit language of the contract directly contradicts the alleged misrepresentation. We see no unfairness in expecting parties to read contracts before they sign them. As the First Circuit stated in *Turner*, if a jury is allowed to ignore contract provisions directly at odds with oral representations allegedly made during negotiations, the language of a contract simply would not matter anymore Contracts would become no more than

presumptive statements of the parties' intentions, instead of legally enforceable agreements." *Omni Home Fin., Inc. v. Hartford Life & Annuity Ins. Co.* (9th Cir. U.S. Dist. 2008) (citing *Cohen v. Wedbush, Noble, Cookie, Inc.* 841 F.2d 282 (9th Cir. 1988)).

The Court went on to intelligently hold that “if a jury is allowed to ignore contract provisions directly at odds with oral representations allegedly made.... [c]ontracts would become no more than presumptive statements of the parties' intentions, instead of legally enforceable agreements.” *Id.*

“As the Ninth Circuit panel in *Cohen v. Wedbush* further discussed, even if an actual misrepresentation was made regarding the function or effect of the arbitration clause, the misrepresentation could render the contract voidable only if the party had reasonably relied upon the misrepresentation. *Id.* (citing 12 S. Williston, *The Law of Contracts* § 1515B, at 485 (3d ed. 1970)). Such reliance cannot be reasonable when the party could have, ‘through the exercise of reasonable diligence, ascertained the truth of the matter.’ *Id.* There can be no unfairness in expecting Vetter to have read the contract he signed. See *id.* Furthermore, the arbitration provision was not hidden from Vetter. It was a large paragraph with a clear subheading in capital letters (“RESOLUTION OF DISPUTES - ARBITRATION”) located just inches above Vetter's signature. *Snap-On Tools Corp. v. Vetter*, 838 F. Supp. 468 (D. Mont. 1993).

Even if the Gardner Defendants made representations concerning how the policies would perform or that the policies were suitable and safe (they did not), Plaintiffs received and signed the illustrations and disclosures which outlined the risks associated with premium financing. *See* Exhibits A-1 – A-4, and B-1 – B-6.

Each document the Plaintiffs received, acknowledged, and signed, contained language regarding the fluctuating nature of interest rates and significant risk associated with premium financing. The documents were even acknowledged and signed by the Stevenson family lawyer, Plaintiff Janette Jones, acting as trustee. Plaintiffs can hardly argue that they were ignorant to the risks associated with premium financing, or that they reasonably relied on Gardner’s alleged misrepresentations.

H. Plaintiffs’ Claims for Fraud and Fraudulent Inducement Fails As a Matter of Law

Plaintiffs make the same allegations as above in support of their claims of fraud and fraudulent inducement.

1. No Representation of Past or Present Material Fact

Plaintiffs point to an email communication from 2014, contending that the Gardner Defendants’ statement that “**at age 80**... the loan balance would be approx. \$18.8M and the gross death benefit is over \$38M, for a net \$20M to the trust. The gross cash value at this point is over \$28M so if you wanted to surrender the policy

and walk away you would leave with \$10M of cash...” evidences a representation as to a past or existing fact. *Id.* ¶ 121. This is nonsensical. The statement starts with “at age 80” and clearly contemplated a scenario far into the future. Plaintiffs also point to another email from the Gardner Defendants where the Gardner Defendants state that Plaintiffs would save on interest over the span of a 10 year period. Again, clearly an opinion and event contemplated in the future.

Every statement made by Gardner in his 2017 email communication were unambiguously opinions concerning the *future*, not representations of a past or existing fact. Plaintiffs themselves admit that the representations were “false promises about future events [...]” SAC at ¶ 361.

“As a general rule, a fraudulent representation must relate to a fact, not the expression of an opinion.” *H&R Block Tax Servs. LLC v. Kutzman*, 2010 U.S. Dist. (D. Mont. Apr. 21, 2010.) .) “It is hornbook law that an actionable misrepresentation must be made about past or existing facts; statements regarding future events are merely deemed opinions.” *S.F. Design Ctr. Assocs. v. Portman Cos.*, 41 Cal. App. 4th 29, 33, 50 (CA 1995.)

2. **Plaintiffs’ Cannot Establish Reasonable Reliance on the Gardner Defendants’ Alleged Misrepresentations**

“A party is not justified in relying on oral representations that conflict with the terms of a subsequent written contract. Where the alleged misrepresentation

contradicts a subsequent written contract . . . reliance upon the fraudulent representation is unreasonable as a matter of law. Indeed, an insured is charged to learn and know the contents of an insurance policy.” *Milazzo v. First Liberty Ins. Corp.*, 2022 U.S. Dist. LEXIS 107034 (M.D. Fla. June 15, 2022) (internal quotations and citations omitted.)

Even assuming *arguendo* that the Gardner Defendants made any false representations to Plaintiff at all, any supposed reliance on them is unjustifiable. To the extent that Plaintiffs argue that the Gardner Defendants’ misrepresentations were “assurance(s) of the purported truth regarding the stability” of the premium finance structure (they were not), “reliance on a misrepresentation is not reasonable when the plaintiff could have, through the exercise of reasonable diligence, ascertained the truth of the matter.” *Omni Home Fin., Inc. v. Hartford Life & Annuity Ins. Co.* (9th Cir. U.S. Dist. 2008) (citing *Cohen v. Wedbush, Noble, Cookie, Inc.* 841 F.2d 282 (9th Cir. 1988)).

At all relevant times, the Stevenson Family had the advice of their counsel (Plaintiff and attorney Janette Krutzfeldt Jones), who along with the Stevenson Family reviewed, acknowledged, and signed the life insurance policies and premium finance documents, which contained countless disclosures in no ambiguous terms. *See Exhibits A-1 – A-4, and B-1 – B-6.*

The countless disclosures were clear – that premium financed life insurance products carried risk and that results were not guaranteed. These disclosures directly contradict the alleged misrepresentations the Gardner Defendants made (they did not), and Plaintiffs were fully advised and made aware of the same.

For the aforementioned reasons, Plaintiffs’ claims for fraud and fraudulent inducement fail as a matter of law.

I. Plaintiffs’ Claim for Unjust Enrichment Fails As a Matter of Law Because Plaintiffs Did Not Pay Commissions

“The essential elements of an unjust enrichment claim are: (1) a benefit conferred on one party by another; (2) the other’s appreciation or knowledge of the benefit; and (3) the other’s acceptance or retention of the benefit under circumstances that would render it inequitable for the other to retain the benefit without compensating the first party for the value of the benefit.” *Morris v. Walmart, Inc.* 2023 U.S. Dist. (MT 2023).

1. Plaintiffs Fail to State Facts to Support the Non-Existence of a Written Agreement

“An unjust enrichment claim exists only in the absence of a valid contract between the parties.” *Filler v. UPS, Inc.*, (MT U.S. Dist. 2021). Plaintiff have failed to plead any facts to suggest there was not a contract between themselves and the Defendants. To the contrary, Plaintiffs continuously reference and identify the Life

Insurance Policies and premium finance agreements thereto, which form the basis of their SAC. Indeed, Plaintiffs make claims for the rescission and restitution of the life insurance policies and premium finance loans. Because Plaintiffs have failed to plead any facts to suggest the absence of a contract, their “unjust enrichment claim [...] fails as a matter of law.” *Filler v. UPS, Inc.*, (MT U.S. Dist. 2021) (holding that absent evidence of the non-existence of a contract, an unjust enrichment claim fails as a matter of law.)

2. **Plaintiffs Were Compensated for the Benefit They Allegedly Conferred Onto Defendants**

Plaintiffs contend that the Stevenson Family “conferred upon Defendants a substantial monetary benefit, including but not limited to monies to purchase the unsuitable Life Insurance Policies and commissions, fees, interest, and other costs.” SAC at ¶ 385.

First, Plaintiffs did not confer a benefit onto the Gardner Defendants. Plaintiffs did not pay any monies to the Gardner Defendants. Rather, the Insurance Defendants paid Gardner commissions. Second, assuming *arguendo* that Plaintiffs conferred any benefit to the Gardner Defendants (they did not), Plaintiffs in turn received value in the form of Gardner procuring the life insurance policies for them, and the life insurance policies themselves (which Plaintiffs continue to own).

J. Plaintiffs' Claim for Punitive Damages Fails As a Matter of Law Because There Was No Fraud and Insurance Agents Are Not Fiduciaries

“Under Montana law, punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice.” *Beggs v. Control Grp. Media Co.*, 2020 U.S. Dist. (MT 2020) (internal quotation marks and citations omitted). “Montana law admittedly requires a finding of actual malice as a prerequisite to the recovery of punitive damages.” *Let's Get Moving, LLP v. Lagestics, LLC*, 2023 U.S. Dist. (D. Mont. Nov. 22, 2023.) “Actual malice exists where the defendant: has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and: (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff, or (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.” *Beggs v. Control Grp. Media Co.*, 2020 U.S. Dist. (MT 2020.)

As discussed at length above, Plaintiffs' claims grounded in fraud are futile because the Gardner Defendant did not owe Plaintiffs any duty beyond that of procuring their requested life insurance policies (which were procured); the Gardner Defendants did not make a misrepresentation of a past or existing fact (any alleged statements were opinions of future events); and even assuming any

misrepresentations were made, Plaintiffs' reliance on those misrepresentations were unreasonable and unjustifiable.

At every turn, Plaintiffs (including attorney Janette Krutzfeldt Jones) reviewed, acknowledged, and signed disclosures advising them of the risks associated with premium finance. The law is clear, "reliance on a misrepresentation is not reasonable when the plaintiff could have, through the exercise of reasonable diligence, ascertained the truth of the matter. Requiring reasonable investigation by the party claiming fraud is particularly appropriate in cases where, as here, the explicit language of the contract directly contradicts the alleged misrepresentation." *Omni Home Fin., Inc. v. Hartford Life & Annuity Ins. Co.* (9th Cir. U.S. Dist. 2008) (citing *Cohen v. Wedbush, Noble, Cookie, Inc.* 841 F.2d 282 (9th Cir. 1988)).

K. Plaintiffs' Claim for Rescission and Restitution Fails As a Matter of Law Because There Was No Contractual Relationship With The Gardner Defendants

"A material breach of a contract gives rise to the equitable remedy of rescission for the non-breaching party. The determination of whether a breach is material is a question of fact. A party who breaches a contract cannot claim entitlement to that contract's benefits after such breach. A party to a contract cannot take advantage of his own act or omission to escape liability thereon." *Walden v. D*

B & D, LLC, 2013 U.S. Dist. (MT 2013) (internal quotation marks and citations omitted).

Here, Plaintiffs have not alleged the breach of a contract as between themselves and the Gardner Defendants. Moreover, and as thoroughly shown above, the Stevenson Family and Janette Krutzfeldt Jones (their attorney), had full opportunity to review the life insurance policies and premium finance loans, reviewed the unambiguous disclosures regarding risks contained therein, and signed the same. Plaintiffs' consent was very much real and free and made through the eyes of experienced businesspeople on the advice of their attorney.

L. **Plaintiffs' Claim for An Accounting Fails As a Matter of Law Because There Is No Relationship Requiring An Accounting**

“Under Montana law, a cause of action for an accounting requires the plaintiff to plead facts demonstrating the plaintiff is unable to procure an accounting for herself. Specifically, a plaintiff must plead facts establishing that she previously demanded that the defendant produce an accounting, and that the defendant refused to do so. Absent those necessary facts a pleading fails to sufficiently state a cause of action for an accounting on which the court can grant relief.” *Redman v. Bank of Am., N.A.*, 2015 U.S. Dist. (MT 2015) (internal quotation marks and citations omitted). “An accounting must show that there is some relationship between the parties requiring an accounting, and that the plaintiff is entitled to a balance that can

only be ascertained by such relief.” *Pfau v. Mortenson*, 858 F. Supp. 2d , 1161 (MT 2012) (internal citation omitted). “The right to an accounting can arise from the possession by the defendant of money or property which, because of the defendant's relationship with the plaintiff, the defendant is obliged to surrender.” *Teselle v. McLoughlin*, 173 Cal. App. 4th 156 (MT 2009.)

Plaintiffs fail to allege any facts to suggest that they and Gardner had a relationship that would require an accounting, and they cannot. As the procuring agent, Gardner only procured the underlying insurance policies for Plaintiffs. Gardner did not receive money or hold accounts on behalf of Plaintiffs in relation to the underlying insurance policies and loans.

To the extent that Plaintiffs seek the “commission structure between the entities”, Plaintiffs were provided with the commissions the Gardner Defendants earned from the Insurance Defendants through initial discovery and before Plaintiffs filed their SAC. The aforementioned commissions are detailed and certain and Plaintiffs are therefore not entitled to an accounting. *Id.* (holding that an accounting is not available where the alleged right to recover is for a sum certain or can be made certain by calculation.)

M. The Sham Pleading Doctrine Precludes Plaintiffs' New and Inconsistent Allegations in the SAC

“[T]he sham pleading doctrine prevents a plaintiff from attempting to breathe life into a complaint by omitting relevant facts from an amended complaint that made the plaintiff's previous complaint defective. Under the sham pleading doctrine, a plaintiff cannot avoid allegations that are determinative to a cause of action simply by filing an amended complaint which omits the problematic facts or pleads facts inconsistent with those alleged in the original complaint. The doctrine precludes a plaintiff from amending a complaint to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers. Instead, the plaintiff must satisfactorily explain such an omission. Failure to provide such an explanation allows the court to disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint.” *Tindell v. Murphy*, 22 Cal. App. 5th 1239, 1248 (CA 2018).

In *Tindell*, the plaintiffs' original complaint alleged that they were injured “by the failure to disclose that the property was manufactured as opposed to modular. However, attached to the complaint was the agent's inspection disclosure, signed by the [plaintiffs], stating the home was manufactured. The listing also specified the home was manufactured.” *Id.* The plaintiffs in *Tindell* later filed an amended complaint alleging that “the defendants failed to disclose the home was

manufactured in 1972 and instead represented that the house was 26 years old and manufactured in 1979. Omitted from the amended complaint was any allegation defendants misrepresented that the home was modular and concealed that the home was manufactured” **after the claims were contradicted by exhibits attached to their complaint.** *Id.* The Court affirmed the trial court’s determination that the plaintiffs were bound by the allegations in their original complaint – that “the misrepresentation they relied on was that the property was modular and the fact that the property was manufactured was concealed from them.” *Id.*

Similarly, here, Plaintiffs’ First Amended Complaint (FAC) alleged that the Gardner Defendants made misrepresentations and omissions to the Stevenson Family by failing to disclose the consequences of rising interest rates. Specifically, Plaintiffs alleged that Defendants did not make the risks associated with premium financing apparent, or that the risks were apparent from the face of the Life Insurance Policies themselves. Conveniently missing from the FAC were the Life Insurance Policies and the premium finance agreements, disclosures, and acknowledgments themselves, which completely contradict Plaintiffs’ allegations and show that the risks associated with premium financing were in fact disclosed to them on multiple occasions across multiple documents, including documents signed by Plaintiffs.

Plaintiffs’ SAC now alleges that although disclosures were made, “Defendants’ misrepresentations and omissions did not run so contrary [to those

disclosures]... to put the Stevenson Family on notice of a problem” and that the Gardner Defendants explained away the risks identified in the countless disclosures. Plaintiffs’ SAC at ¶ 299. As in *Tindell*, where plaintiffs amended their complaint to pivot around the fact that disclosures were made where they claimed weren’t, Plaintiffs here too ask this Court to disregard their former allegations – that no disclosures concerning the risks associated with premium financing were made – but that although disclosures were made, they weren’t good enough.

For the aforementioned reasons, this Court should take the new allegations presented in Plaintiffs’ SAC for what they are – a sham – and bound Plaintiffs to the allegations made in their FAC.

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V. CONCLUSION

For the foregoing reasons, Plaintiffs' SAC fails to state a claim upon which this Court may grant relief against the Gardner Defendants. Therefore, the Gardner Defendants respectfully request that this Court dismiss all of Plaintiffs' counts against the Gardner Defendants, and deny Plaintiffs' Prayer for Relief, with prejudice.

DATED this 7th day of April, 2025.

/s/ Connie M. Fickel

Connie M. Fickel

/s/ Mark D. Parker

Mark D. Parker

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VI. CERTIFICATE OF COMPLIANCE

Pursuant the Joint Stipulation Regarding Plaintiffs' Second Amended Complaint (Doc. 104), and the Order thereto, (Doc. 106), it was ordered that the Gardner Defendants may file an overlength Motion to Dismiss Plaintiffs' Second Amended Complaint.

Pursuant to the District of Montana Local Rule 7.1(d)(2)(E), I certify that the foregoing Brief in Support of the Motion to Dismiss is 10,012 words, excluding the Caption, Certificate of Compliance, Table of Contents and Table of Authorities, Exhibit Index, and any Certificate of Service.

DATED this 7th day of April, 2025.

/s/ Connie M. Fickel
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/s/ Mark D. Parker
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