

06-4307-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

—▶◀—
VERA MULLER-PAISNER,

Plaintiff-Appellant,

v.

TIAA, TIAA-CREF ENTERPRISES, INC., TEACHERS INSURANCE AND ANNUITY
ASSOCIATION, and COLLEGE RETIREMENT EQUITIES FUND,

Defendants-Appellees.

—
*On Appeal from the United States District Court
for the Southern District of New York*

BRIEF FOR DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Appellee TIAA-CREF Enterprises, Inc. is a wholly-owned subsidiary of Appellee Teachers Insurance and Annuity Associates.

Appellee Teachers Insurance and Annuity Associates is wholly owned by the TIAA Board of Overseers, which is a privately-held not-for-profit corporation organized for educational purposes. The TIAA Board of Overseers has no parent corporations.

Appellee College Retirement Equities Fund is a privately-held not-for-profit corporation organized for educational purposes. It has no parent corporations.

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PRELIMINARY STATEMENT

This case arises out of the sale of a “single-life annuity” to a college professor named Mary Engel. A single-life annuity generates income during the life of the annuitant but does not provide for payments to any heirs or other third-party beneficiaries after the annuitant’s death; upon the annuitant’s death, all payments cease. The complaint, filed by the executor of Dr. Engel’s estate, asserts that the sale of this common financial product constituted federal securities fraud as well as common law fraud, breach of fiduciary duty, and negligence under New York law, because by agreeing to set up such an annuity, defendants somehow tricked Dr. Engel into falsely believing that her heirs would be provided for after her death. The allegations in the complaint, however, do not come close to meeting the minimum pleading standards necessary to sustain such claims.

The two fraud claims fail because plaintiff does not allege a single material misrepresentation or omission. Quite the opposite: the complaint *acknowledges* that Dr. Engel was informed by defendants, in writing, that “[u]pon your death, all payments stop.” Moreover, the complaint does not allege any facts that would give rise to an inference of fraudulent intent, beyond the unsupported assertion that defendants wished to “enrich” themselves by defrauding retirees – an assertion that is rendered nonsensical by the fact that defendants reap no extra profit if an annuitant dies before recovering her entire premium.

Plaintiff's fiduciary-duty and negligence claims are similarly deficient: as a matter of law, under the facts alleged, defendants owed no fiduciary or other special duty to Dr. Engel. As New York and federal courts have long held, insurance companies and brokers do not generally owe a fiduciary duty to their policyholders, and purchasers of annuities are presumed under the law to understand the nature of their investments. The complaint alleges no special relationship between defendants and Dr. Engel other than that of insurance company and policyholder.

The district court properly dismissed the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, holding that the facts as pleaded, even if proven, could not support a judgment in plaintiff's favor. On appeal, plaintiff barely confronts, much less disputes, the district court's conclusions regarding the adequacy of the complaint. Instead, she devotes nearly her entire appellate brief to the assertion that the district court improperly based its ruling on certain "documents" that were not attached to the complaint and were therefore inappropriate to consider on a motion to dismiss.

This argument about "documents" is legally incorrect, but more importantly, it is a red herring. Simply put, the complaint is inadequate – on its face – to sustain any of its asserted claims, whether or not one looks to the documents of which the plaintiff complains. To be sure, the district court did not err by examining these

documents, because as the court recognized, they were explicitly referenced – in some instances, quoted – in the complaint. The law in this Circuit is clear that it is entirely appropriate to consider such “integral” material on a motion to dismiss. But in any case, this Court need not even look to these disputed documents in order to affirm the district court’s dismissal order. The complaint is inadequate on its face, and in 30 pages of appellate briefing, the plaintiff has barely contended otherwise.

COUNTERSTATEMENT OF THE ISSUES

(1) Did the trial court err by dismissing the plaintiff’s fraud claims where the complaint contained no allegations of material misrepresentations or omissions and failed to plead scienter with particularity?

(2) Did the complaint allege a legally cognizable duty sufficient to sustain either a breach-of-fiduciary-duty or negligence claim where there was no allegation that the defendant insurance company took any affirmative steps to establish a fiduciary or other special relationship with its policyholder?

COUNTERSTATEMENT OF FACTS¹

Background

The plaintiff-appellant in this case is Vera Muller-Paisner, who is suing in her capacity as executrix of the estate of Mary Engel, a university professor who held a Ph.D. in psychology and who died of emphysema on March 10, 2001, at the age of 70. Defendants are a group of related companies known collectively as “TIAA-CREF” or “TIAA.”² The complaint accurately states that defendants “form

¹ As appellant’s brief discusses in great detail, there was a dispute in the district court over the propriety of the court’s consideration of certain documents that were submitted by the defendants in connection with their motion to dismiss. The plaintiff claimed that she had never seen some of these documents and had not relied upon them in drafting the complaint. This dispute is ultimately irrelevant, because this Court can affirm the dismissal simply by examining the complaint itself along with a handful of documents that are either quoted or otherwise directly referenced in the complaint. For that reason, this counterstatement of facts relies only on the complaint and on those supplemental documents the plaintiff has admitted to having used in preparing the complaint. The discussion of plaintiff’s pre-litigation investigation is drawn from a sworn affidavit filed by plaintiff in the district court.

² We believe that the only proper defendant in this case is Teachers Insurance and Annuity Association (“TIAA”), which is the entity that sold the annuity to Dr. Engel. There is no specific allegation in the complaint that either of the other named defendants (TIAA-CREF Enterprises, Inc. and College Retirement Equities Fund), had any contact with Dr. Engel or was otherwise responsible for the alleged torts. The complaint, however, asserts claims against the “defendants” generally. Because this is an appeal from an order granting a motion to dismiss the complaint, and this Court is required to accept all the allegations in the complaint as true, we will refer in this brief to the “defendants” and refer to them, collectively, as “TIAA.” By doing so, however, we do not waive any corporate-separation arguments that may arise in this or other litigation.

the principal retirement system for this country's education and research communities." JA 11.

Over the course of her 30-year career, Dr. Engel deposited her retirement savings with TIAA through programs made available to her by the various universities (Harvard, the University of Michigan, and the City University of New York) for which she worked. This suit arises from Dr. Engel's decision in September 2000 to fund her upcoming retirement largely by purchasing a "single-life annuity" from TIAA. A single-life annuity is purchased with an up-front premium payment, and it generates monthly income for the life of the annuitant. Upon the death of the annuitant, all payments cease. In Dr. Engel's case, her annuity cost approximately \$1.2 million, and according to plaintiff, it generated an \$8,000 monthly income. Br. 6. Had Dr. Engel lived 12 years past her retirement date, she would have recovered her entire premium; had she lived for 16 years (the average life expectancy for a 70-year-old white woman in the United States³), her \$1.2 million premium would have generated over \$1.5 million in income.

Unfortunately, Dr. Engel died approximately six months after purchasing her annuity, having collected only \$48,000 in payments. The complaint alleges that Dr. Engel was terminally ill at the time she purchased her annuity and that the

³ See Centers for Disease Control, National Vital Statistics Report, Vol. 54, No. 14, at 3, http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf (last visited February 13, 2007).

nature and extent of her illness should have been “obvious” to TIAA because she was “difficult to understand” on the telephone (JA 16); had a “weak and shaky” signature (JA 17); and wrote in one of her letters that “I am ill and cannot come to your offices” (JA 20). Therefore, the complaint alleges, the sale of the annuity was “wrongful” (JA 5), particularly in light of Dr. Engel’s purported “estate plan” – under which various friends and relatives, including plaintiff Muller-Paisner, would inherit the bulk of her savings. The complaint surmises (“on information and belief”) (JA 8) that TIAA must have lied to Dr. Engel about the nature of her purchase, but it does not allege any specific misrepresentations, nor does it allege that defendants were ever actually made aware either of Dr. Engel’s purported “estate plan” or of the extent of her illness. Indeed, documents referenced in the complaint reveal that Dr. Engel explicitly told TIAA representatives that she “had no beneficiaries” and was therefore comfortable purchasing a single-life annuity. Moreover, there are no allegations that Dr. Engel was suffering from any sort of mental defect at the time she purchased her annuity.

Dr. Engel’s Annuity Purchase

By the time Dr. Engel retired on August 31, 2000, she had accumulated approximately \$1.3 million in retirement savings. JA 8. At her written request, \$100,000 was converted to an Individual Retirement Account (JA 51), the balance of which was withdrawn by Dr. Engel in September 2000 (JA 149) and apparently

used to make a down payment on a home (JA 19). The remaining \$1.2 million was used to fund Dr. Engel's annuity.

According to the complaint, Dr. Engel began contacting TIAA about her upcoming retirement "in early March 2000." JA 18. The complaint alleges that between March and August 31, 2000, Dr. Engel spoke on the telephone with TIAA representatives "at least six" times. *Id.* TIAA kept records of these telephone conversations. The complaint also alleges that Dr. Engel sent "numerous" letters to TIAA during this period, requesting information and directing TIAA to distribute her savings among various investments. JA 17.

On August 21, 2000, Dr. Engel spoke on the telephone with at least two TIAA representatives. JA 48-49. The complaint quotes from the contemporaneous notes of one of those representatives, who stated that "the participant was difficult to understand but she is electing a single life annuity." JA 16, 48. The following day, Dr. Engel spoke with another representative, who noted the following in a document that plaintiff examined prior to filing the complaint: "Assisted her with annuity income forms. She is considering a single life annuity. *She doesn't have any beneficiaries, so she is comfortable with the single life annuity.*" JA 65 (emphasis added).

That same day, Dr. Engel sent a letter to TIAA, typed on her own university letterhead, stating the following: "I understand that my accumulation is

\$1,342,554.81, as of August 21, 2000. I wish to roll into an IRA \$100,000 of this. Please include Transfer Payout Annuity in the sum on which you base my monthly check. Please set up single life annuity without a guaranteed period, standard payout method.” JA 51.

Enclosed with the August 22 letter was a 12-page “authorization” form that had been completed by Dr. Engel and signed by her before a notary public. On the first page of this form, Dr. Engel completed a section titled “Choosing an Annuity Income Option.” This section described various types of annuities, some with guaranteed periods and designated beneficiaries. Dr. Engel checked the box next to the option that stated “Single life annuity (all payments end with your death).” JA 52. In the left margin of this section was a note that read, “If you choose a guaranteed period, name a beneficiary in Section 6.” Dr. Engel left Section 6 (“Choosing Your Beneficiary”) blank, despite filling out information in other sections on the same page. JA 54.

On September 5, 2000, Dr. Engel sent another letter to TIAA, complaining that she had not yet received any distributions from her retirement savings. The letter, which was typed on Dr. Engel’s university letterhead and was quoted in the complaint (at JA 19-20), stated that “it is essential that you act ASAP. I am not getting paid. I am unable to make a down payment on a house.” JA 73. The letter went on to confirm Dr. Engel’s prior requests: She wished to have \$100,000

converted to a “classic IRA,” the composition of which she specified in detail (\$55,000 was to be placed in a money market account, and \$45,000 into one of TIAA’s mutual funds). The remaining funds were to be used to purchase a single-life annuity: “Confirming: annuitize 100% remaining TIAA-CREF accounts under the standard method, 0 year survivorship.” *Id.* As the complaint recounts, Dr. Engel stated in this letter that she was “ill” and therefore could not visit TIAA’s offices in person. JA 20 (quoting JA 74).

The annuity purchase and IRA rollover were finalized as of September 6, 2000. JA 149. At some later point, at a time when the complaint alleges (“upon information and belief”) (JA 18) that Dr. Engel had an option to rescind her purchase, TIAA mailed a number of documents to Dr. Engel, including a 12-page booklet called “Your Service Directory.” The complaint quotes the first section of this booklet, which stated under “Income Option” that Dr. Engel had purchased a “Life Annuity with No Guaranteed Period.” “Under this option,” the directory explained, “you receive income. *Upon your death, all payments stop.*” JA 18, 132 (emphasis added). The complaint alleges that this booklet was nonetheless “misleading and deceiving,” because later in the booklet, under a general description of services available to holders of various kinds of annuities, the booklet stated that beneficiary designations could be “change[d] *** at any time.” JA 18-19, 138.

After her elections were finalized, Dr. Engel withdrew the \$100,000 balance of her IRA, presumably in order to make the down payment on her new home. JA 19, 157. She received income from the annuity until her death from emphysema on March 10, 2001.

Subsequent Events

As far as may be ascertained from the complaint, Dr. Engel was not married at the time when she retired and purchased the annuity (though she apparently married a childhood friend approximately two months prior to her death), and she had no children or other direct heirs. She did, however, have a will, which was executed approximately one year prior to her retirement and which purported to devise her estate to various friends, relatives, charities, and caretakers for her pets. JA 9, 21. After her death, the will was admitted to probate in Connecticut. JA 6. The plaintiff, Vera Muller-Paisner, was named executrix of Dr. Engel's estate and was also named as the primary beneficiary under Dr. Engel's will. *Id.*

Plaintiff soon discovered that Dr. Engel had depleted her retirement savings by purchasing the annuity and by making a substantial down payment on her new home. At plaintiff's direction, the attorney for the Engel estate, Bernice Kowosky, placed telephone calls to TIAA, seeking more information about the annuity purchase. JA 145. TIAA responded to Ms. Kowosky's telephone requests with a letter dated August 17, 2001. This letter explained the retirement purchases Dr.

Engel had made, including dates of purchase, account numbers, balances, and the record of payments and withdrawals. It also provided a telephone number for the attorney to call if she had any further questions. JA 149-50.

Ms. Kowosky did not make any further telephone inquiries. Instead, nearly one year later, plaintiff herself wrote a letter to TIAA requesting a variety of documents relating to Dr. Engel's retirement benefits. The letter also requested that TIAA furnish plaintiff with copies of any training manuals it prepared for its own staff as well as an explanation of various internal procedures at TIAA. JA 151. Approximately one month after receiving the letter, defendants called the plaintiff to apologize for the delay in responding; one month after that, defendants mailed a package of documents to the plaintiff. Plaintiff was apparently dissatisfied with the package because it failed to include any TIAA training manuals or other documents that did not relate specifically to Dr. Engel. JA 146. Plaintiff requested these additional documents by telephone, and defendants did not comply with the request. JA 146-47.

According to her sworn affidavit, the documents that plaintiff received from TIAA "caused [her] to believe that the defendants had improperly caused or permitted [Dr. Engel] to purchase an unsuitable investment from them." JA 147. These documents later formed the basis for plaintiff's complaint. As noted, the complaint quotes directly from some of these documents. It also refers more

broadly to “a number of” letters Dr. Engel sent to TIAA (JA 17), and to defendants’ records of telephone conversations (JA 18-20).

Approximately one year after receiving the package of documents, plaintiff hired a new attorney, who sent a letter to the chairman and CEO of TIAA-CREF. JA 152-53. This letter described plaintiff’s belief that Dr. Engel’s decision to purchase a single-life annuity was “totally inappropriate,” that the error “must have been obvious” to TIAA, and that TIAA had a “duty” to refuse Dr. Engel’s requests. The letter threatened litigation unless TIAA produced various documents relating to Dr. Engel’s accounts as well as “the related policies of TIAA-CREF in general.” JA 153. The letter also demanded that the plaintiff’s counsel be permitted to meet with all TIAA employees who spoke with Dr. Engel “and their supervisors.” Defendants did not respond to this letter. The complaint was filed one month later, alleging federal securities fraud as well as breach of fiduciary duty, negligence, and common law fraud under New York law.

Proceedings in the District Court

Defendants moved to dismiss the complaint on October 27, 2003. JA 30. In support of the motion, defendants submitted certain documents that appeared to have been quoted or otherwise referred to in the complaint. Specifically, defendants submitted copies of Dr. Engel’s letters to TIAA, TIAA’s records of its employees’ phone conversations with Dr. Engel, and the contracts and other

documents that accompanied the annuity purchase. In response, plaintiff filed an affidavit in which she acknowledged that certain of the documents had been included in the package of materials that “caused [her] to believe that the defendants had [acted] improperly,” but claimed that other documents were unfamiliar to her. JA 143, 147. As noted above, the statement of facts in this brief refers only to (1) documents quoted in the complaint, and (2) documents on which the plaintiff admits she relied in drafting the complaint.

The district court granted the motion to dismiss on August 10, 2006. JA 178. It dismissed the fraud counts because it found as a matter of law that the complaint did not allege facts that, if proven, could support the conclusion either that the defendants had made any material misrepresentations or that the defendants had acted with fraudulent intent. JA 170. On the fiduciary duty count, the court held that the complaint had not alleged any facts that could lead to the conclusion that TIAA owed a fiduciary duty to Dr. Engel. JA 176. The same holding led to dismissal of the negligence count, which the court noted also requires a plaintiff to establish a special duty owed by the defendant to the plaintiff. JA 177.

Judgment was entered on August 16, 2006. JA 179. This appeal followed.

SUMMARY OF ARGUMENT

Plaintiff is wrong when she argues that the district court erred by considering certain documents not attached to the complaint, but this Court need not even reach that question: Considered by itself, without reference to *any* extrinsic documents, the complaint is insufficient to survive a motion to dismiss. The two fraud counts do not allege facts sufficient to state a claim, because the complaint alleges neither a material misrepresentation nor any facts from which a jury could possibly infer that defendants acted with scienter. In addition, the federal securities claim is time-barred. The fiduciary-duty and negligence claims are similarly insufficient because as a matter of law, the defendants owed no special duty, fiduciary or otherwise, to Dr. Engel. And even if they did, the complaint does not allege any actions that would constitute a breach of such a duty.

In any event, the district court did not err when it briefly discussed certain documents that were not attached to the complaint. Most of the documents the district court discussed were “integral” to the complaint, and therefore could be considered on a motion to dismiss, because plaintiff has admitted to relying upon them when drafting it. And the few documents plaintiff claims *not* to have relied upon were quoted extensively in her memorandum opposing the motion to dismiss; plaintiff continues to rely upon those documents in her brief to this Court.

ARGUMENT

I. ON ITS FACE, THE COMPLAINT FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED.

As we have explained, the insufficiency of plaintiff's claims is evident from the complaint itself and the handful of documents referenced therein; plaintiff neither disputes the authenticity of those documents nor argues that they cannot be considered on a motion to dismiss. We will not, in this section of the brief, refer to or discuss any other documents – even those documents that plaintiff admits she relied upon in drafting the complaint. Thus, this Court can affirm the dismissal of the complaint on the grounds addressed in this section without reaching the question whether the district court erred in relying on other documents in the record.

The complaint asserts four causes of action: (1) common law fraud under New York law (JA 23-24); (2) breach of fiduciary duty (JA 24); (3) negligence (*id.*); and (4) federal securities fraud under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (JA 25-26). The complaint also seeks “not less than Five Million Dollars” in punitive damages. JA 26-27. None of these claims survives even cursory scrutiny. The two fraud claims cannot survive because the complaint fails to allege a material misrepresentation and does not adequately plead scienter. The negligence and fiduciary duty claims fail because as a matter of law, the defendants were not fiduciaries and owed no special duty to Dr. Engel.

Of course, “[i]n reviewing a decision on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6),” this Court “must accept as true all the factual allegations in the complaint and draw all reasonable inferences in plaintiffs’ favor.” *Joblove v. Barr Labs., Inc.*, 466 F.3d 187, 200 (2d Cir. 2006) (internal citation omitted). Review of the district court’s decision is de novo. *Fernandez v. Chertoff*, 471 F.3d 45, 51 (2d Cir. 2006).

A. The Fraud Claims Were Properly Dismissed.

The plaintiff asserts two fraud claims: a common-law claim under New York law and a federal securities claim under § 10(b) of the Exchange Act. Under either theory, the plaintiff is required to prove substantially the same elements: (1) that the defendant made material misstatements or omissions; (2) that the defendant acted with scienter, or wrongful intent; (3) that the plaintiff relied on the defendant’s misrepresentations or omissions; and (4) that the plaintiff was injured as a proximate result of her reliance. See, e.g., *In re IBM Corp. Sec. Litig.*, 163 F.3d 102, 106 (2d Cir. 1998) (listing elements of § 10(b) claims); *Wynn v. AC Rochester*, 273 F.3d 153, 156 (2d Cir. 2001) (per curiam) (listing elements of New York common-law fraud claim). Under the federal statute, the plaintiff is also required to plead and eventually prove that the fraud was committed in connection with the purchase or sale of securities. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005).

In addition, a complaint asserting fraud under either theory must satisfy the heightened pleading requirement of Federal Rule of Civil Procedure 9(b), which requires fraud to be alleged “with particularity.” See generally *Kalnit v. Eichler*, 264 F.3d 131, 138-39 (2d Cir. 2001) (discussing heightened pleading standards for § 10(b) actions under both Rule 9(b) and the Private Securities Litigation Reform Act, 109 Stat. 737 (codified at 15 U.S.C. §§ 77z-1 and 78u-4) (“PSLRA”)); *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co.*, 375 F.3d 168, 187 (2d Cir. 2004) (holding that Rule 9(b) pleading standards apply to fraud claims brought under New York law).

1. The Complaint Does Not Allege A Misrepresentation Or Omission.

The complaint simply does not allege, with any degree of particularity, that any of the defendants made a misrepresentation or a misleading omission in a communication with Dr. Engel. The complaint puzzles at great length over why Dr. Engel would choose to purchase a single-life annuity rather than some other retirement product, and it surmises, without support, that she must have done so at the fraudulent urging of TIAA’s representatives. JA 22. But in the 63 paragraphs and 24 pages that make up the complaint, there is not a single allegation of a fraudulent statement made to Dr. Engel, or of a misstatement or material omission in the documents Dr. Engel received from TIAA.

This is a fatal flaw. In order to satisfy the heightened pleading requirements of Rule 9(b) and the PSLRA, a fraud plaintiff cannot simply *speculate* that a defendant must have made fraudulent misstatements, and such allegations may not be pled “upon information and belief.” Instead, as this Court has explained many times, the complaint must ordinarily specify “the time, place, speaker, and content of the alleged misrepresentations.” *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 191 (2d Cir. 2001) (citing *Luce v. Edelstein*, 802 F.2d 49, 54 (2d Cir. 1986)).⁴ In this case, plaintiff has failed to do so, and for that reason alone, this Court should affirm the dismissal of the two fraud claims.

There is only one item in the complaint that even comes close to being a specific allegation of a misrepresentation, and that allegation simply cannot support a fraud claim. The complaint alleges that Dr. Engel was “deceiv[ed]” by a 12-page “Service Directory” that was sent to her after she purchased her annuity. JA 18. The directory, the complaint alleges, was intentionally “misleading”

⁴ There is a limited exception to the prohibition on “information and belief” pleading for “matters peculiarly within the opposing party’s knowledge.” *Luce*, 802 F.2d at 54 n.1. But “[t]o satisfy Rule 9(b) in [that] instance, the allegations must be accompanied by a statement of the facts upon which the belief is founded.” *Id.* No such statement can be found in the plaintiff’s complaint or in any other filing.

Indeed, the complaint and other filings in this case are surprisingly oblique regarding the factual underpinnings of the allegations of fraud. Despite the fact that the complaint refers to – and quotes from – various documents the plaintiff claims to have found in Dr. Engel’s home and received from the defendants prior to litigation, plaintiff has not once specified what these documents are.

because it stated, as part of a general description of services available to annuitants, that beneficiary designations could be “change[d] *** at any time.” JA 18-19, 138. But as the complaint also reveals, the very first section of that booklet stated in clear, unequivocal language that Dr. Engel had chosen to purchase a “Life Annuity with No Guaranteed Period,” a product that did *not* permit any beneficiary designations at all. “Under this option,” the directory explained, “you receive income. *Upon your death, all payments stop.*” JA 18, 132 (emphasis added).

It simply defies logic to assert that TIAA’s Service Directory was intended to deceive – or did deceive – any reasonable person into believing that the purchaser of a single-life annuity could designate “beneficiaries” who would collect the proceeds of the annuity following the policyholder’s death. The booklet correctly explained that annuitants *who were eligible to designate beneficiaries could change those designations*, but it also very clearly stated that Dr. Engel was not such an annuitant. And what Dr. Engel believed is, of course, irrelevant; the question is what a reasonable person who reviewed the document would have thought. “A misrepresentation is material to a fraud claim only if it is the type of misrepresentation likely to be deemed significant to a reasonable person considering whether to enter into the transaction.” *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 170 (2d Cir. 1999) (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). (Of course, the complaint offers no facts from which one

could infer that Dr. Engel did in fact believe anything other than what she was expressly told: that a single-life annuitant *cannot* designate a beneficiary.)

Plaintiff claims in her appellate brief that it is “reasonable” to infer from the complaint that “defendants *** failed to make clear to the Decedent the adverse consequences purchasing the annuity at issue would have to her estate plan.” Br. 8-9. But such an inference is not reasonable at all. Indeed, it is overwhelmingly clear, from the facts actually pled in the complaint, that Dr. Engel was told *exactly* what she was purchasing and *exactly* the consequences of her purchase. The documents quoted in the complaint – indeed, the very sections the plaintiff chose to excerpt and reproduce – revealed in clear, simple language that no beneficiary would inherit Dr. Engel’s annuity. See JA 18 (“Upon your death, all payments stop.”) (quoting JA 132).

2. The Complaint Does Not Allege Scierter.

Even if the complaint had alleged some misrepresentation or fraudulent omission, it would still be inadequate to survive a dismissal motion because it does not properly allege scierter. To state a fraud claim under either New York law or the Exchange Act, a plaintiff must plead that the defendant acted with “an intent to deceive, manipulate or defraud.” *Kalnit*, 264 F.3d at 138 (quoting *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 168 (2d Cir. 2000)). And just as a plaintiff cannot simply speculate about the commission of fraudulent *acts*, she is also

prohibited from maintaining a claim based simply on unfounded accusations of a fraudulent *state of mind*. Specifically, in order to survive a motion to dismiss, this Court has held that a complaint alleging fraud must plead *particular facts* that “give rise to a strong inference of fraudulent intent.” *Kalnit*, 264 F.3d at 138 (quoting *Novak v. Kasaks*, 216 F.3d 300, 307 (2d Cir. 2000)); see also 15 U.S.C. § 78u-4(b)(2) (codifying this pleading standard for federal securities fraud cases). This may be accomplished in one of two ways: “either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.” *Acito v. Imcera Group, Inc.*, 47 F.3d 47, 52 (2d Cir. 1995).

The complaint does not come close to meeting this standard. For the most part, it recites only conclusory, unsupported allegations of scienter, many based on “information and belief,” and all untethered to any facts whatsoever. See, e.g., JA 17 (“[E]ither defendants *** were negligent *** or defendants knowingly and willfully took advantage of Decedent’s condition.”); JA 25 (“[I]t is clear that defendants were engaged in *** a course of business which operated as a fraud and deceit upon the Decedent and they acted with the intent to deceive, manipulate and defraud her.”); JA 26 (“Upon information and belief, defendants’ wrongs hereinabove set forth were willful and intentional.”); JA 27 (“Upon information

and belief, defendants' wrongs hereinabove set forth were not only willful and intentional *** but were part of a pattern in which defendants took advantage of other elderly retirees.”).

There are only two allegations in the complaint that even arguably address the proper standards for pleading scienter, and neither is remotely sufficient to survive a motion to dismiss. First, the complaint alleges that defendants had a motive to deceive Dr. Engel, because they would be “enrich[ed]” by the wrongful sale of a single-life annuity. JA 6, 10. Second, the complaint asserts that defendants “attempt[ed] to conceal” the details of Dr. Engel’s purchase from the representatives of her estate by providing “non-responsive and evasive” answers to a telephone request made by the estate’s attorney. This behavior, plaintiff alleges, demonstrates “conscious[ness] of guilt.” JA 22. These allegations are insufficient as a matter of law and untenable as matters of fact.

a. Plaintiff did not plead motive and opportunity.

As a matter of law, the allegations that “[a]s defendants believed when causing Mary Engel to purchase the annuity, the foreseeable loss to the estate would enrich them” (JA 6), and that defendants “would be benefited by the Decedent’s mistake” (JA 18), cannot support plaintiff’s fraud claims. To begin, the naked assertion that a defendant would be “enriched” by perpetrating a fraudulent scheme is not enough, as a matter of law, to give rise to the “strong

inference of fraudulent intent” necessary to satisfy the applicable pleading standard. “Motive,” this Court has held, necessarily “entail[s] *concrete benefits* that could be realized” as a result of the alleged fraud. *Shields v. Citytrust Bancorp.*, 25 F.3d 1124, 1130 (2d Cir. 1994) (emphasis added). Such a motive must be specific to the defendant and to the fraud alleged. Merely alleging that a corporate defendant stood to “benefit” from a fraudulent scheme by being “enriched” is not enough to meet this standard. Every for-profit entity desires, by definition, to “enrich” itself by making profitable sales. If that were all that were necessary to satisfy the “motive and opportunity” pleading standard of Rule 9(b) and the PSLRA, *every* complaint alleging any sort of monetary fraud on the part of a corporation would suffice. But that is not the law. See, e.g., *Kalnit*, 264 F.3d at 139 (“Motives that are generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from the fraud.”) (citing *Novak*, 216 F.3d at 307-08).

Even allegations of far more specific and far stronger motivations for fraud – for example, that particular executives were motivated to deceive investors in order to earn bonuses contingent on high stock prices or otherwise to maintain their jobs and compensation – have been held insufficient. See, e.g., *Kalnit*, 264 F.3d at 139; *Acito*, 47 F.3d at 54 (“Incentive compensation can hardly be the basis on which an

allegation of fraud is predicated.”); *Shields*, 25 F.3d at 1130 (“To allege a motive sufficient to support the inference [of fraudulent intent], a plaintiff must do more than merely charge that executives aim to prolong the benefits of the positions they hold.”). It follows *a fortiori* that a bare assertion of a company’s motivation to “enrich” itself is likewise insufficient.

The allegations of motive are insufficient for a second, equally compelling reason: they are demonstrably and obviously incorrect. The complaint’s failure to explain *how* the alleged fraudulent scheme would have “enriched” defendants is unsurprising: an insurance company does not earn a profit if an annuitant dies before the balance of his annuity is paid out. Rather, any unused funds are reallocated to other annuitants in the same class. See, e.g., *Woodworth v. Prudential Ins. Co.*, 258 A.D. 103, 107 (N.Y. App. Div. 1939) (terming “erroneous” the “notion that defendant has a profit for itself of the balance of the \$100,000 not paid the annuitant during his lifetime. *** [T]he entire purchase price of the contract and the balance remaining unpaid become part of a required reserve fund for the benefit of all annuitants in the class. *** Annuitants who die early receive less than the amount paid; those who survive beyond the expectancy period receive more than they paid.”), *aff’d*, 282 N.Y. 704 (1940); *Tabachinsky v.*

Guardian Life Ins. Co., 147 N.Y.S.2d 719, 722 (Sup. Ct. 1956) (same).⁵ An assertion of potential “benefit” to the defendant is *particularly* insufficient when it is a *mistaken* assertion. As this Court has explained, “[i]n looking for a sufficient allegation of motive, we assume that the defendant is acting in his or her informed economic self-interest. *** ‘Plaintiffs’ view of the facts defies economic reason, and therefore does not yield a reasonable inference of fraudulent intent.’” *Shields*, 25 F.3d at 1130 (quoting *Atlantic Gypsum Co. v. Lloyds Int’l Corp.*, 753 F. Supp. 505, 514 (S.D.N.Y. 1990)).

In her brief to this Court, plaintiff all but concedes the fanciful nature of her allegation of a “potential windfall.” Br. 22. She nonetheless argues that the district court erred by holding this allegation to be inadequate to meet the standards for alleging scienter with particularity: “Whether there would actually be a windfall,” the plaintiff writes, “is the wrong question. The question was whether

⁵ Plaintiff asserts on appeal that the district court somehow determined, based on an “unsworn assertion in defendants’ Reply Brief,” that TIAA did not receive a windfall from Dr. Engel’s purchase. Br. 24. But the district court made no such finding. It held that “there is no indication [in the complaint] that Defendants intended to deceive or manipulate Decedent.” JA 169. In any case, our argument about the impossibility of a “windfall” for TIAA is simply an observation, supported by decades of unanimous judicial decisions, about the way in which annuities are structured. This Court may take judicial notice of such a fact, which is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” FED. R. EVID. 201(b); see also *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (in deciding motion to dismiss, this Court may consider “matters of which judicial notice may be taken”).

defendants' counselors *believed* that by cheating Decedent, their employers would reap a windfall." *Id.* (emphasis in original). "It is reasonable to assume," plaintiff argues, "that the counselors are rewarded on some basis for signing up someone who would be paid only a small portion of her purchase price." Br. 23. Putting aside the fact that such an assumption would not be "reasonable" at all – because, as discussed, TIAA has no *motive* to reward its employees for such behavior – this rank speculation was not even pled in the complaint. Nor could it have been, without violating Rule 11. *Cf. Renner v. Chase Manhattan Bank*, 98 Civ. 926, 2000 U.S. Dist. LEXIS 8552, at *29 (S.D.N.Y. Jun. 16, 2000) (noting, in opinion dismissing fraud claim for failure to plead scienter with particularity, that the "suggested motives for participation in the fraud are mere conjectures and do not appear in the complaint"), *aff'd*, 85 Fed. Appx. 782 (2d Cir. 2004).

As for plaintiff's assertions on appeal that "defendants" – as distinct from their employees – were motivated to cheat decedent by the belief that they would "reap a windfall by her death" and that "[d]efendants anticipated the Decedent's early death and a windfall profit to themselves" (Br. 3, 6) these statements are unsupported by any facts whatsoever. There are no allegations in the complaint of any facts that would indicate TIAA believed it would reap a windfall.

b. Plaintiff did not allege facts that would constitute strong circumstantial evidence of conscious misbehavior or recklessness.

Plaintiff's assertion that scienter may be inferred from the "conscious[ness] of guilt" allegedly demonstrated by the defendants' "evasive" response to the plaintiff's pre-litigation inquiries (JA 22-23) likewise fails as a matter of law. It is certainly true that in some contexts (often criminal cases), evidence of a defendant's consciousness of guilt (usually a false exculpatory statement or some other like behavior) can provide independent support for a finding of scienter. See, e.g., *S.E.C. v. Musella*, 748 F. Supp. 1028, 1042 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 138 (2d Cir. 1990). But even if Rule 9(b) and the PSLRA could be satisfied by alleging "evasive" behavior demonstrating consciousness of guilt (and plaintiff has not cited any case where such allegations were deemed sufficient to satisfy either standard), defendants' behavior in *this* case, as described in the complaint and the plaintiff's own sworn statement, was anything but "evasive." In response to a telephone inquiry by the estate's attorney, defendants sent a letter to the estate accurately detailing the disposition of Dr. Engel's assets. JA 149-50. The letter also invited further inquiry: "If you have any questions, or would like assistance, please feel free to call our Telephone Counseling Center *** and we'll be glad to help." JA 150. As far as may be ascertained from the complaint and from plaintiff's sworn affidavit, neither she nor her attorney made any further telephone

inquiries. It was not until nearly one year later that plaintiff first wrote to defendants requesting a variety of documents relating to Dr. Engel's retirement benefits. Within one month, defendants (who were under no legal obligation to respond to such a request) called plaintiff to apologize for the delay in responding; one month after that, defendants mailed a package of documents to plaintiff. Plaintiff made a further telephone request for TIAA's internal "training manuals." She did not hear back, and waited another year before contacting defendants again, this time in a letter addressed to the chairman and CEO of TIAA-CREF demanding various additional documents and threatening litigation against the company. Defendants did not respond to this letter before the plaintiff filed suit one month later.

This sequence of events certainly does not constitute "strong circumstantial evidence of conscious misbehavior." *Acito*, 47 F.3d at 52. In order to plead fraudulent intent through circumstantial evidence, a plaintiff must allege behavior that was "highly unreasonable, representing an extreme departure from the standards of ordinary care." *Rothman v. Gregor*, 220 F.3d 81, 90 (2d Cir. 2000). The pre-litigation behavior described in the complaint cannot possibly meet this standard. Defendants were under no obligation to respond in any manner to the plaintiff's broad-ranging inquiries, including demands for copies of internal training documents and personal interviews with employees. Nevertheless, they

responded promptly to plaintiff's requests and furnished a variety of apparently relevant documents. This behavior was hardly "an extreme departure from the standards of ordinary care."

Likewise, plaintiff's suggestion that improper intent may be inferred from TIAA's alleged suggestion to Dr. Engel that she confirm her investment choices in writing is similarly unavailing. For one thing, this allegation is pure speculation, explicitly made on "information and belief." JA 20. The suggestion that TIAA's employees "basically wanted to insulate themselves and defendants from legal action" (*Id.*) is wholly conclusory and therefore insufficient to meet the heightened pleading standards necessary for alleging fraud. In any case, as the district court explained, this allegation (taken as true) is far more susceptible of an innocent explanation than a nefarious one: "Defendants *** informed Decedent of the kind of annuity she was purchasing, which indicates a willingness on Defendants' part to enlighten, rather than deceive Decedent." JA 169-70.

3. Plaintiff's Federal Claim Is Time-Barred.

Plaintiff's federal securities fraud claim fails for an additional, independent reason: it is time-barred. Fraud actions under the Securities Exchange Act are subject to a one-year statute of limitations. 15 U.S.C. § 78i(e); see also *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson*, 501 U.S. 350, 360-63 (1991). The limitations period begins to run "upon discovery of the facts constituting the

alleged fraud,” or “when a reasonable investor of ordinary intelligence would have discovered the existence of the fraud.” *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d Cir. 1993).

The complaint alleges that Dr. Engel was defrauded in the summer of 2000, when she was allegedly misled by TIAA representatives into believing that a single-life annuity was an appropriate retirement investment. However, the complaint was not filed until August 20, 2003, nearly three years after the alleged fraud and – more importantly – nearly three years after defendants sent Dr. Engel documentation clearly indicating that she had purchased a retirement product that did not provide for any payments to her heirs. If the fraud consisted of providing misleading “investment advice” and a fraudulent inducement to purchase a single-life annuity, the documentation memorializing the sale (which stated plainly that “upon your death, all payments stop”) should have been sufficient to place Dr. Engel on notice that she had been defrauded.

But even if that documentation was somehow so confusing as to be insufficient to “suggest to an investor of ordinary intelligence the probability that she ha[d] been defrauded,” *Dodds*, 12 F.3d at 350, that would still not save this claim. For one thing, Dr. Engel’s heirs, including the plaintiff in this case, were in possession of these documents soon after Dr. Engel died, in March 2001. From the face of the complaint, it is evident that plaintiff herself believed the documentation

to be purposefully misleading. That fact alone started the limitations clock ticking. Moreover, according to the plaintiff's own sworn affidavit, she became convinced of the alleged fraud after receiving "a package of documents" from the defendants "on or about August 12, 2002." JA 146. These documents, she wrote, "caused [her] to believe that the defendants had improperly caused or permitted the Decedent to purchase an unsuitable investment from them." JA 147. She filed her complaint more than a year later, after having learned no more information about the nature of TIAA's relationship with Dr. Engel.⁶

B. The Fiduciary-Duty And Negligence Claims Were Properly Dismissed.

As the district court correctly held, plaintiff's remaining claims – for breach of fiduciary duty and simple negligence – both fail for the same reason: As a matter of New York law, the defendants owed no special duty to Dr. Engel. To make out a claim for breach of fiduciary duty, the plaintiff must demonstrate (1) the existence of a fiduciary duty, and (2) the breach of that duty. *In re NYSE Specialists Sec. Litig.*, 405 F. Supp. 2d 281, 302 (S.D.N.Y. 2005). Similarly, a negligence claim requires proof of "the existence of a duty on defendant's part as

⁶ Plaintiff argued below that the limitations period was tolled because the defendants concealed information that would have led her to discover the fraud. This claim is factually untenable because there was no fraudulent concealment (see *supra*, at 27-29), but in any case, even if it were true, it would not excuse the delay between August 12, 2002, when the plaintiff received the allegedly damning documents in the mail, and August 20, 2003, when she filed her complaint.

to plaintiff.”” *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111, 114 (2d Cir. 2000) (per curiam) (quoting *Akins v. Glens Falls City Sch. Dist.*, 53 N.Y.2d 325, 333 (1981)). The allegations contained in the complaint are insufficient to establish that TIAA owed any type of special duty to Dr. Engel. Moreover, to the extent that defendants *did* owe a duty to Dr. Engel, the complaint does not allege that they *breached* any such duty.

1. The District Court Properly Dismissed The Fiduciary-Duty Claim.

a. The relationship between defendants and Dr. Engel was not fiduciary.

It is well established under New York law that parties to an arm’s-length business transaction, such as the purchase and sale of an annuity contract, do not have a fiduciary relationship. See, e.g., *Mid-Island Hosp., Inc. v. Empire Blue Cross & Blue Shield*, 276 F.3d 123, 130 (2d Cir. 2002); *Dopp v. Teachers Ins. & Annuity Ass’n*, 91 Civ. 1494, 1993 U.S. Dist. LEXIS 13980, at *15 (S.D.N.Y. Oct. 1, 1993) (“The arm’s-length relationship of parties in a business transaction is, if anything, antithetical to the notion that either would owe a fiduciary relationship to the other.”). More specifically, insurance companies do not owe fiduciary duties to their policyholders. See, e.g., *Batas v. Prudential Ins. Co.*, 724 N.Y.S.2d 3, 7 (App. Div. 2001). The relationship between insurers and their policyholders is contractual, *id.*, and New York courts have routinely and consistently held for over

100 years that such a relationship is not fiduciary. See, e.g., *Murphy v. Kuhn*, 90 N.Y.2d 266, 270-73 (1997); *Methodist Hosp. v. State Ins. Fund*, 64 N.Y.2d 365, 375 (1985); *Uhlman v. New York Life Ins. Co.*, 109 N.Y. 421 (1888); *Gaidon v. Guardian Life Ins. Co.*, 679 N.Y.S.2d 611, 612 (App. Div. 1998), *aff'd as modified*, 94 N.Y.2d 330 (1999).

In unusual circumstances, an insurer may take affirmative steps that establish a fiduciary relationship with specific policyholders. Thus, for example, New York courts (like those in virtually every other jurisdiction) have held that an insurance company has a fiduciary duty to protect the interests of insureds that the company is defending in litigation. *Hartford Acc. & Indem. Co. v. Mich. Mut. Ins. Co.*, 462 N.Y.S.2d 175 (App. Div. 1983), *aff'd*, 61 N.Y.2d 569 (1984). And, as the plaintiff points out (Br. 28-29), there is one published New York case in which a trial court held that a fiduciary-duty claim against an insurance company could survive a motion to dismiss, where the complaint specifically alleged that a representative of the company had intentionally lied to an 80-year-old customer, telling her that a life annuity “would produce the largest return possible on her investment” and was therefore “a suitable investment” for her. *Meagher v. Metro. Life Ins. Co.*, 463 N.Y.S.2d 727, 728 (N.Y. Sup. Ct. 1983).

On appeal, plaintiff argues that her complaint falls within this narrow exception to the general rule that an insurance company owes no fiduciary duty to

its clients. Her argument is based primarily on allegations in the complaint that TIAA manages the retirement savings of “approximately 2.5 million people” and in that capacity represents to the public that it is willing “to help almost anyone plan for retirement and savings goals and protect against risks.” JA 11. The complaint alleges that defendants employ a staff of “counselors,” who are available to provide “advice and guidance” to retirees. JA 12. The district court erred, plaintiff argues, by “overlooking the significance of the complaint’s allegations describing defendants and their long-standing relationships with millions of teachers.” Br. 28.⁷

Such allegations, taken as true, do not give rise to a fiduciary duty. As the courts have consistently explained, fiduciary-duty claims against insurance companies may be maintained only under “exceptional” circumstances, where the plaintiff has specifically alleged a “unique” relationship with the defendant that somehow “differs from that of a reasonable consumer.” *Batas*, 724 N.Y.S.2d at 7.

⁷ Plaintiff also claims that the district court erred by “fail[ing] to recognize the fundamental differences between an insurance policy and annuity.” Br. 25. But in determining an insurance company’s duty to its policyholders, New York law makes no distinction between annuities and other types of insurance products. See *Batas*, 724 N.Y.S.2d at 7. Insurance companies do not owe a fiduciary duty to their policyholders because other than in “exceptional cases,” the relationship between the parties is not one of “trust and confidence,” but is instead “created by the contract alone.” Plaintiff points to no cases in which any court (in New York or elsewhere) has held that an insurance company owes a greater duty to a customer who purchases an annuity than to one who purchases any other type of insurance product.

The mere fact that an insurance company might have “superior knowledge” of its own products, or that it holds itself out to the public as a “trusted name” is not enough to make out an allegation of a fiduciary relationship. *Id.*; see also *Murphy*, 90 N.Y.2d at 273 (“[I]nsurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status.”); *Gaidon*, 679 N.Y.S.2d at 612; *Rochester Radiology Assocs. v. Aetna Life Ins. Co.*, 616 F. Supp. 985, 988 (W.D.N.Y. 1985) (“I find nothing in the caselaw or New York statutes to indicate that an insurance company is a fiduciary for its policyholders; in fact, the law appears to be to the contrary.”).⁸

Thus, fiduciary-duty claims against insurance companies are ordinarily dismissed on the pleadings as a matter of law. As the First Department recently explained in *Batas*, such a claim cannot survive dismissal unless the plaintiff alleges, as the plaintiffs did in *Meagher*, facts suggesting unusual “overreaching” by the defendant. “[I]n the absence of some additional allegation [beyond general representations made to the public] showing a more direct or affirmative effort by defendants to gain plaintiffs’ trust and confidence, for example the sales efforts by

⁸ See also, *e.g.*, *Sipes v. Equitable Life Assurance Soc’y of the United States*, No. C-94-3868, 1996 U.S. Dist. LEXIS 12325, at *15 (N.D. Cal. Aug. 13, 1996) (“An insurer does not have the duty to advise the insured on the adequacy of its coverage limits; strong public policy considerations militate against such a requirement, as it would turn the insurer into a personal financial counselor for the insured.”) (internal quotation marks omitted).

a salesman or the actions of a representative, no fiduciary relationship is alleged.”

Batas, 724 N.Y.S.2d at 7.

Plaintiff’s allegations, even if proven, would not establish that TIAA had any sort of “unique” relationship with Mary Engel that somehow “differ[ed] from that of a reasonable consumer.” Nor would those allegations establish that the defendants took any “direct or affirmative” steps to establish a fiduciary relationship with Dr. Engel. Plaintiff states in her appellate brief that it is “reasonable” to infer from the complaint that “defendants knew that she was relying upon them for investment and planning advice, as she had in the past” (Br. 8), but this statement is completely untethered to any factual allegation that actually appears in the complaint. There are no allegations that Dr. Engel ever sought TIAA’s “investment and planning advice,” either “in the past” or as she approached retirement. The complaint alleges that Dr. Engel spoke with TIAA’s “counselors” on the telephone, but not that she sought their “advice” with respect to her investment decisions. Quite the contrary: As the complaint states, Dr. Engel herself referred to her communications with TIAA’s “counselors” as “request[s]” for particular retirement products. JA 20.⁹

⁹ Plaintiff also argues that it is “reasonable” to infer from the complaint that TIAA never sent Dr. Engel certain “promised information as to other investment options.” Br. 9. This is untrue. The complaint contains no such allegations, either that TIAA ever “promised” to send Dr. Engel anything, or that TIAA failed to follow through on such a “promise.” Plaintiff appears to be referring to one of the

At bottom, plaintiff is arguing that TIAA is a fiduciary to every retired teacher in the country, or at least every teacher who calls the company to purchase a retirement product or to ask for help filling out forms. Indeed, she claims that defendants have an obligation to investigate the mental and physical health of every potential customer, and to refuse to sell retirement products to any person they believe is making a financially unsound decision. See, e.g., JA 14 (“[D]efendants had the *** obligation to ascertain the mental and physical health and capacity of the Participants *** who sought their counsel, advice and guidance, to be reasonably assured that the Participants had the ability to make sound investment judgments and be alert to the possibility *** that such investments might defeat the Participants’ estate plans.”); JA 19 (claiming that TIAA breached its fiduciary duty by selling Dr. Engel an annuity when it was “obvious” that doing so might make it difficult for Dr. Engel to pay the mortgage on a new home).¹⁰ This is not the law in New York, as this Court has explicitly

documents that she elsewhere argues may not be considered on a motion to dismiss. Specifically, after an August 31, 2000 phone conversation, one of TIAA’s representatives noted in the file that she had requested that “an illustration [be] sent to [Dr. Engel].” JA 72. There is no indication in the record, and certainly no allegation in the complaint, that TIAA failed to mail Dr. Engel this illustration. In any case, the law in New York is clear that TIAA had no duty to advise Dr. Engel about “appropriate or additional coverage.” *Murphy*, 90 N.Y.2d at 269-70.

¹⁰ Relatedly, the complaint also alleges (on “information and belief”) that TIAA violated certain NASD regulations (the “Know Your Customer” and “Suitability” rules) by failing to inquire about Dr. Engel’s financial wherewithal

recognized. See *Miller v. Hartford Life Ins. Co.*, 64 Fed. Appx. 795, 798 (2d Cir. 2003) (“[T]here is no duty cast upon the defendant to investigate the health of those seeking annuities.”) (quoting *Tabachinsky*, 147 N.Y.S.2d at 722). If such broad-based actions were all that were required for an insurance company to establish a fiduciary relationship with a customer, then surely, the “exception” would swallow New York’s general rule. It is clear, however, that this is not the case.¹¹ Accordingly, the district court correctly dismissed plaintiff’s fiduciary-duty claim.

before selling her an annuity. JA 13-14. These allegations are not incorporated into any specific claims, nor are they asserted as grounds for reversal. Plaintiffs do, however, describe these allegations in their appellate statement of facts, so we include a brief discussion of their merits. In short, the complaint does not assert any tort claim as to which these allegations are relevant; plaintiff has not, to our knowledge, filed any documents with the NASD requesting that that body institute any proceedings against TIAA. She would be hard-pressed to do so; it is well established that “no private right of action exists under the suitability and ‘know your customer’ rules of the NYSE and NASD.” *Grey v. Gruntal & Co.*, No. 84 Civ. 5036, 1984 U.S. Dist. LEXIS 21218, at *4 (S.D.N.Y. Dec. 14, 1984) (citing *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980); *Klock v. Lehman Bros. Kuhn Loeb Inc.*, 584 F. Supp. 210 (S.D.N.Y. 1984); *Picard v. Wall Street Discount Corp.*, 526 F. Supp. 1248 (S.D.N.Y. 1981); *Colman v. D.H. Blair & Co.*, 521 F. Supp. 646 (S.D.N.Y. 1981)). In any case, as this Court has noted, fixed annuities (such as the product Dr. Engel purchased) are not “securities” under federal law. *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101 (2d Cir. 2001). Nor are they “securities” under New York law. See *Meagher*, 463 N.Y.S.2d at 729.

¹¹ As for plaintiff’s passing suggestions (at Br. 9, 25) that this transaction was somehow improper “self dealing” because TIAA sold Dr. Engel a TIAA-administered product, that is a gross misstatement of law. An insurance company does not engage in “self dealing” when it sells its own product in an arms-length transaction to a customer. In the insurance context, “self dealing” refers to a

b. Even if defendants *did* owe Dr. Engel a fiduciary duty, plaintiff does not allege facts on which a jury could find that such a duty was breached.

TIAA did not owe any fiduciary duty to Dr. Engel, but even if it had, the claim would have to be dismissed for a second, independent reason: the complaint does not allege any activity that would constitute a *breach* of such a duty. The complaint surmises that TIAA must have given Dr. Engel poor advice, or lied to her, but it does not allege any facts that would support such a conclusion. To the contrary: the complaint itself demonstrates that TIAA acted responsibly.

Even if TIAA had specifically advised Dr. Engel to purchase an annuity (and the complaint does not allege any facts that could lead to such a conclusion), that advice would have been improper only if TIAA knew that Dr. Engel was terminally ill, or that she wished to preserve her estate for her heirs. But the complaint does not allege any of this. There is no reason to believe, from the facts pled in the complaint, that TIAA was aware of Dr. Engel's imminent death, or that she ever told defendants about any "estate plan." The health problems, the complaint alleges, should have been "obvious" to TIAA because Dr. Engel "wheezed and coughed" while talking on the telephone (JA 16) and her signature was "weak and shaky" (JA 17). That assertion is, of course, wholly insufficient.

situation where a fiduciary has the ability to make investment decisions on behalf of a third party and then "cause[s]" the third party to transact business with the fiduciary. See, e.g., 29 U.S.C. § 1106.

The complaint also quotes a September 5, 2000 letter, sent to TIAA after the annuity purchase had already been made, in which Dr. Engel stated that she was “ill” and therefore could not personally visit TIAA’s New York offices. JA 20. Plaintiff draws from this statement the conclusion that “defendants were aware of [Engel’s] impairments.” Br. 8. But the complaint does not allege (nor can it) that TIAA ever had reason to believe that Dr. Engel’s unspecified “ill[ness]” was life-threatening or would otherwise make her retirement decisions inappropriate. Indeed, the letter quoted in the complaint expressed Dr. Engel’s frustration that TIAA had not acted more quickly in effectuating her annuity purchase, and very clearly stated that Dr. Engel wished to purchase an annuity with “0 year survivorship.” JA 20.

As for Dr. Engel’s so-called “estate plan,” plaintiff *concedes* that TIAA knew nothing about it. Instead, the complaint asserts that TIAA had an “obligation to investigate” whether or not Dr. Engel had a will that conflicted with her annuity purchase. JA 17. Nothing in the caselaw would support the imposition of such an obligation. And in fact, TIAA had every reason to believe that Dr. Engel did *not* have any heirs. As the complaint recounts, Dr. Engel sent “numerous” letters to TIAA, on her own university letterhead, specifically requesting an annuity with “0 year survivorship.” JA 17, 20. The written confirmation she received back, as the

complaint also details, stated in plain terms that “upon your death, all payments stop.” JA 18.

It is also worth noting that Dr. Engel was a 70-year-old college professor (who was still employed as such throughout most of the time she was speaking with TIAA representatives), she held a doctoral degree, and she sent multiple letters, typed on her own letterhead, clearly indicating her preferences. Selling an annuity to such a client would not constitute any sort of breach even assuming, counterfactually, that TIAA owed her a fiduciary duty.¹²

2. The Negligence Claim Likewise Fails: There Was No Duty And No Breach.

Finally, the trial court did not err by dismissing plaintiff’s negligence claim, which also requires an allegation (and, eventually, proof) that the defendant owed a

¹² See, e.g., *Woodworth*, 258 A.D. at 107; *Jones v. Teachers Ins. & Annuity Ass’n*, 934 S.W.2d 307, 311 (Mo. Ct. App. 1996) (“It is unfortunate when a single monthly payment is all an annuitant has to show for an annuity, although the annuitant in this case is deceased and would not benefit from any relief granted by the trial court. Courts have long held that rescission of an annuity contract is improper simply because an annuitant dies earlier than expected. Under their agreement, Mrs. Jones bore the risk that she would die earlier than expected and appellant bore the risk that Mrs. Jones would live many years beyond what was predicted by the actuarial tables.”); *Rishel v. Pac. Mut. Life Ins. Co.*, 78 F.2d 881, 887 (10th Cir. 1935) (“An annuity contract cannot be avoided because the annuitant dies before attaining his average expectancy, or because it develops that his health was so impaired when the contract was written that his expectancy was less than the average. Annuity contracts could not be written by financially responsible companies if a recovery of the premium pro tanto could be had upon proof after death of some impairment of the organs when the contracts were written.”).

duty to the plaintiff beyond the general duty of good faith and fair dealing. Absent evidence of a “special relationship” between an insurance company and a policyholder, there is no duty under New York law for the insurer to give advice about the “terms of its insurance policy,” *Manes Org., Inc. v. Meadowbrook-Richman, Inc.*, 2 A.D.3d 292, 293 (N.Y. App. Div. 2003), or about “appropriate or additional coverage.” *Murphy*, 90 N.Y.2d at 269-70. We do not dispute, as the plaintiff argues in her appellate brief, that when a party “assum[es] a duty” (Br. 29), he generally takes on the responsibility to perform that duty in a non-negligent fashion. See, e.g., *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 289 (2001) (“A duty may arise from a special relationship that requires the defendant to protect against the risk of harm to plaintiff.”). But there are no allegations in the complaint that TIAA ever acted to take on any special duty to Dr. Engel. There are no allegations of any specific solicitations to her, or any representations made to her by any TIAA employees.

The only potentially-relevant allegations are that defendants “form the principal retirement system for this country’s education and research communities,” and that they hold themselves out to the public as being willing “to help almost anyone plan for retirement.” JA 11. But New York’s highest court has explicitly held that such allegations are insufficient to establish the sort of “special relationship” that would impose on the defendants a duty to act non-

negligently. See *Murphy*, 90 N.Y.2d at 269-70 (rejecting plaintiffs' claim that "a special relationship developed from a long, continuing course of business between plaintiffs and defendant insurance agent, generating special reliance and an affirmative duty to advise with regard to appropriate or additional coverage"). And of course, as we detailed above, even if TIAA had owed a special duty to Dr. Engel, there are no allegations of any breach of such a duty. The complaint explicitly concedes that TIAA advised Dr. Engel in writing that the annuity she purchased would not provide payments to any beneficiaries after her death.¹³

II. THE DISTRICT COURT WAS PERMITTED TO CONSIDER THE DOCUMENTS SUBMITTED WITH THE MOTION TO DISMISS.

On its face, the complaint is inadequate to withstand a motion to dismiss. Plaintiff appears to recognize the futility of defending the legal sufficiency of her allegations on appeal; indeed, she devotes only eight pages of her appellate brief to refuting the district court's analysis, and she addresses only some of the court's holdings. Rather than seriously contest the dismissal of her complaint, plaintiff has chosen instead to focus on an irrelevant quibble: The district court erred, plaintiff

¹³ Plaintiff asserts (at Br. 28) that the extent of TIAA's supposed duty to Dr. Engel is a factual question not appropriate to a motion to dismiss. That is not the case. See *Eiseman v. New York*, 70 N.Y.2d 175, 187 (1987) ("Unlike foreseeability and causation, both generally factual issues to be resolved on a case-by-case basis by the fact finder, the duty owed by one member of society to another is a legal issue for the courts.").

argues, by examining certain “documents” that were not attached to the complaint and thus not properly considered on a motion to dismiss.

Even if it were correct, this argument would get plaintiff nowhere, because (as we have shown) this Court can affirm the dismissal without examining anything other than the complaint itself and the documents that are directly quoted or referenced therein. Indeed, despite plaintiff’s overwrought characterization (“The entire decision was based upon the defendants’ documents.”) (Br. 14), the district court barely referenced, let alone discussed, any documents other than the complaint itself. In the entire opinion, the district court cited to or quoted from the complaint itself 26 times (on JA 155-56, 158, 160-61). In contrast, the court made only six references to documents outside the complaint (on JA 157 and 159).

In any event, plaintiff’s argument is wrong. The district court was permitted to consider the extrinsic documents it discussed in its opinion, because (with the exception of a handful of documents that did not figure heavily in its analysis), they were all documents that plaintiff *admits* to relying upon in drafting her complaint.

A. It Is Proper To Consider Documents That Are “Integral” To The Complaint In Considering A Motion To Dismiss.

On a motion to dismiss brought pursuant to Rule 12(b)(6), a district court is permitted to consider the allegations in the complaint as well as “any written instrument attached to it as an exhibit or any statements or documents incorporated

in it by reference.” *Int’l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (per curiam) (quoting *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991)). Moreover, “[e]ven where a document is not incorporated by reference, the court may nevertheless consider it where the complaint ‘relies heavily upon its terms and effect,’ which renders the document ‘integral’ to the complaint.” *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (quoting *Int’l Audiotext*, 62 F.3d at 72). As plaintiff correctly observes, an extraneous document is not considered “integral” to the complaint merely because the plaintiff possessed or had notice of it. Where, however, the plaintiff “rel[ie]d] on the terms and effect of a document in drafting the complaint,” that document may properly be considered on a dismissal motion. *Chambers*, 282 F.3d at 153 (citing *Cortec*, 949 F.2d at 47-48).¹⁴

¹⁴ As plaintiff points out (at Br. 20), the district court cited *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993), an opinion that plaintiff claims has been “expressly disapproved” by *Chambers*. We do not disagree with plaintiff that the *Brass* court may have overreached by suggesting that documents merely “in the possession” of a plaintiff may be considered on a motion to dismiss. But the district court did not apply that standard. It correctly applied the law, holding that it is proper to consider documents that are “referenced by Plaintiff in the Complaint and/or were relied on by Plaintiff in bringing the instant suit.” JA 163.

B. Most Of The Documents Discussed By The District Court Were Indisputably “Integral.”

Notwithstanding plaintiff’s undifferentiated objection in this Court to the district court’s consideration of all documents included with the defendants’ motion to dismiss, the propriety of very few documents is *actually* in dispute. Certainly, there is no dispute that the district court was permitted to examine the various documents from which the complaint *actually quoted*. See *Int’l Audiotext*, 62 F.3d at 72. These documents included records of telephone conversations (*e.g.*, JA 16 (quoting JA 48)), letters from Dr. Engel to TIAA (JA 20 (quoting JA 73-74)), and the “Your Service Directory” booklet (JA 18 (quoting JA 132); JA 19 (quoting JA 138)). In addition, the district court was undeniably permitted to examine documents to which the complaint explicitly referred, such as the records of the “six telephone ‘counseling sessions’” that took place “commencing in early March 2000 and continuing through August 31, 2000.” JA 18 (referring, presumably, to documents reproduced at JA 48, 49, 50, 65, 66-68, and 69-72).¹⁵ See *Int’l Audiotext*, 62 F.3d at 72.

Finally, as discussed above, when “a plaintiff[] reli[es] on the terms and effect of [any] document in drafting the complaint,” the district court may examine that document on a motion to dismiss, without converting the motion to one for

¹⁵ There is some dispute as to which telephone conversations are referenced in the complaint. We elaborate on this dispute below, at 49-50.

summary judgment. Here, plaintiff *admits* to having relied on the terms and effect of *most* of the documents to which she now objects. In the affidavit that she submitted in opposition to defendants' motion to dismiss, plaintiff acknowledged having "received from defendants" copies of most of the documents that were later attached to the dismissal motion. JA 145. These documents, the plaintiff averred, "*caused me to believe* that the defendants had improperly caused or permitted the Decedent to purchase an unsuitable investment from them." JA 147 (emphasis added). After receiving no response to her lawyer's letter threatening litigation, the plaintiff continued, "we concluded *from the information we had* and defendants' resistance to our inquiries, that it was reasonable to believe that defendants had been guilty of negligence, intentional misstatements and fraud. *Accordingly, we then commenced this action.*" *Id.* (emphasis added). Based on this affidavit, it is clear that the plaintiff "relied upon the terms and effect" of the documents she received from defendants when drafting the complaint.

Thus, the district court was permitted to examine the documents plaintiff herself admits to having received from the defendants. The court's opinion refers briefly to three such documents: (1) a letter from Dr. Engel directing TIAA to establish her \$100,000 IRA and set up her single life annuity (JA 157 (quoting JA 51)); (2) the authorization form Dr. Engel signed (*Id.* (referencing JA 52-63)); and

(3) the record of a phone conversation in which Dr. Engel reportedly informed TIAA that she had no beneficiaries (JA 158-59 (quoting JA 65)).

C. The Remaining (Disputed) Documents Were Not Relied Upon By The District Court.

In the end, the only documents actually in dispute (*i.e.*, those that were not quoted or referenced in the complaint or otherwise relied upon by the plaintiff in drafting the complaint) are those reproduced in the Joint Appendix at JA 35-44 and JA 75-127. The first group of documents consists of letters from Dr. Engel to TIAA, and TIAA's records of phone conversations with Dr. Engel, all dated between October 1, 1999, and February 8, 2000. These letters and phone records memorialize early, general inquiries Dr. Engel made regarding her options for distribution of her retirement savings. The district court did not rely on these documents in its opinion, other than a single passing reference to one of the letters, which did not have anything to do with Dr. Engel's annuity purchase. See JA 157 (quoting JA 44 ("I wish to cash in one tenth of my TIAA accumulation that came from previous employment at Harvard University and at the University of Michigan. I am enclosing Transfer Payout Annuity papers from these universities.")). The second group of documents consists of TIAA's formal acknowledgement of Dr. Engel's annuity purchase and the two formal annuity contracts. The district court's opinion did not discuss those documents either.

We note as well that the plaintiff denies having ever seen records of two telephone conversations that were attached to the motion to dismiss and discussed in the district court's opinion. These records (reproduced at JA 66-72 and discussed by the district court at JA 159-60) memorialize conversations that took place on August 30 and 31, 2000. As the district court recounted, the records indicate that TIAA's representatives questioned Dr. Engel's decision to purchase a single-life annuity. See, *e.g.*, JA 159 (quoting JA 67) ("I also attempted to ask if she really wanted to use all of her funds in the conversion of a single life annuity knowing that all payments end with her death with no provision for any beneficiary at all. At her age and the balance involved a full annuity would be against the normal logic. I am not sure that she really understood what I was asking."). The records also indicate that Dr. Engel explicitly told TIAA representatives that she had no heirs. See, *e.g.*, JA 159 (quoting JA 71) ("I also confirmed again with [Engel] that she wanted to annuitize 100% with no guarantee period in SLO. [Engel] stated that she was a Holocaust survivor and has no family for which she should leave funds.").

As the district court explained, plaintiff relied upon and quoted from these records in her own memorandum of law opposing the motion to dismiss. See JA 159-60 (citing Pl.'s Mem. at 20 n.4). Plaintiff did not move to strike these documents; indeed, she asserted in her memorandum that the documents "contain

damning admissions, bordering on ‘smoking guns.’” Pl. Mem. at 20.¹⁶ Indeed, plaintiff continues to rely upon these documents on appeal. See, e.g., Br. 11. Having relied on the documents herself, she cannot now object to the court’s consideration of them.

In any event, although the district court summarized these conversations in its recitation of the facts, it did not refer to them in its analysis of the legal issues. To the extent this Court believes it was error for the district court to reference the telephone summaries, the error was certainly harmless, because as we discuss above, this Court can affirm dismissal of the complaint without ever examining anything outside the four corners of the complaint. Indeed, out of an abundance of caution, we have refrained from relying upon the contents of these documents in this brief.

Finally, we feel compelled to acknowledge plaintiff’s hyper-technical argument (at Br. 21 n.2) that the district court erred by failing to strike defendants’

¹⁶ It should go without saying that defendants reject that characterization. Plaintiffs find it significant that TIAA’s counselor noted that Dr. Engel’s annuity purchase was “against the normal logic” (JA 67), but as the documents themselves reveal, this concern apparently prompted TIAA (1) to warn Dr. Engel that an annuity would not provide for her heirs, (2) to ask her whether she wanted to preserve any part of her estate for her beneficiaries (Dr. Engel’s answer was an unequivocal “no”), (3) to share detailed information with Dr. Engel about her retirement options, and (4) to request that Dr. Engel confirm her choices in writing. If anything, these disputed documents show that TIAA acted *responsibly* in its dealings with Dr. Engel.

submission of documents because the accompanying declaration from defense counsel did not comply with 28 U.S.C. § 1746. According to plaintiff, the declaration was inadequate because it did not state that it was being executed “under penalty of perjury.” We doubt that it is reversible error for a district court to accept a declaration made by an attorney (whose every filing in federal court is governed by Rule 11 and therefore sanctionable if untrue), merely because the attorney failed to utter certain magic words.¹⁷ Whether or not that is true, however, any possible confusion over whether the declaration was submitted “under penalty of perjury” was cured by the attorney’s subsequent signed filing, in which she “vehemently denied” that her declaration was perjurious. Def. Reply Mem. at 2 n.1.

Similarly, plaintiff is wrong to assert that defendants’ motion somehow violated New York’s “Dead Man’s Statute.” That provision (N.Y. C.P.L.R. 4519) only prohibits *testimony* by an interested party about a transaction with a deceased person, and in any case, the prohibition does not apply in cases where the deceased person’s survivor (plaintiff, in this case) introduces similar evidence “concerning the same transaction.” The entire complaint is premised on plaintiff’s

¹⁷ We acknowledge, however, that research has not revealed any caselaw on this point.

representations about Dr. Engel's communications with TIAA; TIAA is not prohibited from defending itself with documentation of those communications.

CONCLUSION

This Court should affirm the district court's decision dismissing the complaint and granting judgment to defendants.

Dated: New York, New York
 February 15, 2007

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,955 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: February 15, 2007

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CERTIFICATE OF SERVICE

I, Lauren R. Goldman, one of the attorneys for Defendants-Appellees, do hereby certify that I have this day served a true and correct copy of the foregoing Brief for Defendants-Appellees, in hard copy and electronic form, by e-mail and overnight mail, postage prepaid, on the following counsel of record:

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So certified, this 15th day of February, 2007.

/s/ Lauren R. Goldman
Lauren R. Goldman

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