

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	Chapter 11
)	Case No. 09-32672
LIFE FUND 5.1, LLC, et. al.,)	(Jointly Administered)
)	
Debtors.)	Honorable A. Benjamin Goldgar
)	
)	
PATRICK M. COLLINS, solely as TRUSTEE of LIFE FUND 5.1, LLC, et. al.,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 10-00104
)	
AVIVA LIFE AND ANNUITY COMPANY,)	
)	
Defendant.)	

COMES NOW DEFENDANT, Aviva Life and Annuity Company (“Aviva”), and for its Amended Answer to Plaintiff Patrick M. Collins’ Complaint for Declaratory Relief states:

PARTIES

1. Patrick M. Collins is the duly appointed chapter 11 Trustee of the estates of the Debtors.

ANSWER: Aviva admits the allegations contained in paragraph 1.

2. Defendant AVIVA Life and Annuity Company (“AVIVA”) is an Iowa Corporation.

ANSWER: Aviva admits the allegations contained in paragraph 2.

JURISDICTIONAL ALLEGATIONS

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1334(b) because this adversary proceeding arises in or under, and is related to, the above-captioned cases pending in the United States Bankruptcy Court for the Northern District of Illinois (the “Court”).

ANSWER: Aviva admits the allegations contained in paragraph 3.

4. This adversary proceeding constitutes a “core” proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O).

ANSWER: Aviva admits the allegations contained in paragraph 4.

5. Venue is proper pursuant to 28 U.S.C. § 1409.

ANSWER: Aviva admits the allegations contained in paragraph 5.

GENERAL ALLEGATIONS

6. On September 2, 2009 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

ANSWER: Aviva admits the allegations contained in paragraph 6.

7. On September 16, 2009, the Court entered an Order Directing Joint Administration of Related Chapter 11 Cases, which directed joint administration of the Debtors’ cases under Case No. 09-32672.

ANSWER: Aviva admits the allegations contained in paragraph 7.

8. On September 16, 2009, the Court entered an Order Granting U.S. Trustee’s Motion to Appoint a Chapter 11 Trustee.

ANSWER: Aviva admits the allegations contained in paragraph 8

9. On September 21, 2009, the Office of the United States Trustee appointed the Trustee as chapter 11 trustee of the Debtors’ estates.

ANSWER: Aviva admits the allegations contained in paragraph 9.

ALLEGATIONS RELATING TO THE POLICY

10. Upon information and belief, AVIVA issued the Policy – universal life policy number B05020454.

ANSWER: Aviva admits the allegations contained in paragraph 10.

11. The Policy has a \$5,000,000 face value.

ANSWER: Aviva admits that Aviva Policy No. B05020454 (“the Policy”), prior to its lapse for nonpayment of premium, had a face amount of \$5,000,000.00.

12. AVIVA’s records reflect that Houston Tanglewood Partners, LLC owns the Policy.

ANSWER: Aviva admits that Houston Tanglewood Partners, LLC was listed as the owner of the Policy prior to its lapse.

13. In their respective Schedules of Assets and Liabilities, Houston Tanglewood Partners, LLC and A&O Resource Management, Ltd. both purport to own interests in the Policy.

ANSWER: Aviva has not had the opportunity to review the referenced Scheduled of Assets and Liabilities identified in paragraph 13 of the Complaint. Therefore, Aviva denies the allegations contained in paragraph 13 for lack of information sufficient to form a belief.

14. Thus, there is no dispute that one or more of the Debtors owns the Policy.

ANSWER: Aviva denies the allegations contained in paragraph 14 for lack of information sufficient to form a belief.

15. According to AVIVA, prior to the Petition Date, the Policy was in its grace period and was scheduled to lapse on September 19, 2009 (17 days following the Petition Date) unless \$24,090.40 (the “Premium Obligation”) was paid by that date.

ANSWER: Aviva admits that the Policy was scheduled to lapse pursuant to its terms on September 19, 2009, unless sufficient premium was paid on the Policy by that date. Aviva denies any other allegation contained in paragraph 15.

16. By letter dated August 4, 2009, AVIVA informed Houston Tanglewood Partners, LLC that payment of the Premium Obligation would provide coverage for two months beyond September 19, 2009. See Exhibit A attached hereto.

ANSWER: Aviva admits that Exhibit A attached to the Complaint speaks for itself. Aviva denies any other allegation contained in paragraph 16.

17. By letter dated September 21, 2009, AVIVA informed Houston Tanglewood Partners, LLC that the Policy terminated for non-payment of premiums. See Exhibit B attached hereto.

ANSWER: Aviva admits that Exhibit B attached to the Complaint speaks for itself. Aviva denies any other allegation contained in paragraph 17.

18. On September 28, 2009, the Trustee delivered a letter to AVIVA in which he, among other things, requested information about the Policy, including any upcoming premium obligations. See Exhibit C attached hereto.

ANSWER: Aviva admits that Exhibit C attached to the Complaint speaks for itself. Aviva denies any other allegation contained in paragraph 18.

19. AVIVA never formally responded to the Trustee's September 28, 2009 letter.

ANSWER: Aviva admits the allegations contained in paragraph 19.

20. On October 21, 2009, the Trustee filed a Motion for Entry of an Order Authorizing Him to Borrow Cash Value of Insurance Policy to Pay Certain Premium Obligations, pursuant to which the Trustee requested authority to borrow funds from the case value of life policy number 00060081812, which policy is with Transamerica (the "Transamerica Policy"), to pay, among other obligations, the Premium Obligation.

ANSWER: Aviva denies the allegations contained in paragraph 20 for lack of information sufficient to form a belief.

21. On October 28, 2009, the Court entered an Order Authorizing Trustee to Borrow Against Cash Value of Insurance Policy to Pay Certain Premium Allegations (the “Borrowing Order”), which (a) authorized the Trustee to borrow \$75,000 from the Transamerica Policy, (b) directed Transamerica to advance the funds to the Trustee within 24 hours, and (c) authorized the trustee to pay the Premium Obligation.

ANSWER: Aviva denies the allegations contained in paragraph 21 for lack of information sufficient to form a belief.

22. On October 29, 2009, the Trustee received a check in the amount of \$75,000 from Transamerica, which was the first time the Debtors’ estates had any funds from which to pay the Premium Obligation.

ANSWER: Aviva denies the allegations contained in paragraph 22 for lack of information sufficient to form a belief.

23. On October 30, 2009 (58 days after the Petition Date) the Trustee transmitted a check in the amount of \$24,090.40 (the “October 30 Check”) to AVIVA to satisfy the Premium Obligation. The check was drawn from an account the Trustee had recently opened in connection with the Debtors’ cases. In his correspondence to AVIVA on that same date, the Trustee stated that, although payment on account of the premium Obligation was made following September 19, 2009 (the purported lapse date), pursuant to 11 U.S.C. §108(b), the Trustee had until November 1, 2009 to cure any defaults under the Policy. See Exhibit D attached hereto.

ANSWER: Aviva admits that on or about October 30, 2009 the Trustee transmitted a starter check to Aviva in the amount of \$24,090.40. Aviva further states that Exhibit D speaks for itself. Aviva denies any other allegation contained in paragraph 23.

24. On or about November 6, 2009, the Trustee received a letter from AVIVA returning a copy of the October 30 Check and stating that, pursuant to the USA Patriot Act, AVIVA could not accept a temporary check for the payment of the Premium Obligation. See Exhibit E attached hereto. Nevertheless, AVIVA invited the Trustee to “send a payment in an acceptable form to Aviva within 30 days of the date of this letter.” Id. AVIVA did not otherwise object to the Trustee’s contention that he had until November 1, 2009 to cure any default under the Policy by paying the Premium Obligation. See Id.

ANSWER: Aviva admits that pursuant to the USA Patriot Act, it could not accept a starter check from the Trustee for payment of premiums on the Policy. Aviva further states that Exhibit E speaks for itself. Aviva expressly denies that it waived any protection or requirement established by 11 U.S.C. § 108(b) in its rejection of the starter check as required by the USA Patriot Act. Aviva denies any other allegation contained in paragraph 24.

25. On November 10, 2009, the Trustee's counsel delivered a letter and cashier's check to AVIVA in the amount of \$24,090.40. The Trustee's counsel maintained that the Trustee was preserving all rights under 11 U.S.C. § 108(b), and that he considered the Policy to be in full force and effect. Upon information and belief, AVIVA cashed and deposited the Trustee's \$24,090.40 check. See Exhibit F attached hereto.

ANSWER: Aviva admits that on or about November 10, 2009, outside the 60-day savings period provided by 11 U.S.C. § 108(b), the Trustee tendered to Aviva a cashier's check in the amount of \$24,090.40. Aviva further admits that pursuant to its normal process, the cashier's check was cashed and deposited into a holding account. However, Aviva affirmatively states that all funds represented by the cashier's check were not retained by Aviva, but rather were refunded and tendered back to the Trustee. Aviva states that Exhibit F speaks for itself. Aviva denies any other allegation contained in paragraph 25.

26. On November 18, 2009, AVIVA delivered a letter to the Trustee in which AVIVA indicated that to "reinstate" the Policy, the Trustee must (a) complete a reinstatement application, and (b) tender payment to AVIVA in the amount of \$20,265.47, which AVIVA claimed "represents the amount needed to pay the premium from July 20, 2009 through November 20, 2009 - \$44,355.87 - less the \$24,090.40 previously remitted." See Exhibit G attached hereto. AVIVA further stated that the minimum monthly premium under the Policy is \$6,755.15. Id. AVIVA did not dispute the Trustee's reliance upon 11 U.S.C. § 108(b). See id.

ANSWER: Aviva admits that because the policy had lapsed, it delivered a reinstatement offer to the Trustee in the form dictated by the Policy. Aviva states that Exhibit G

speaks for itself. Aviva expressly denies that it was required to “dispute” the Trustee’s reliance upon 11 U.S.C. § 108(b). Aviva denies any other allegation contained in paragraph 26.

27. The following day, on November 19, 2009, the Trustee’s counsel delivered a letter and cashier’s check to AVIVA in the amount of \$27,020.62, which amount represented the balance of the purported amount owed for the period July 20, 2009 through November 20, 2009 (*i.e.*, \$20,265.47), plus one additional purported monthly premium payment for December, 2009 (*i.e.*, \$6,755.15). See Exhibit H attached hereto. In addition, the Trustee again maintained that the Trustee had timely satisfied all obligations to maintain the Policy and the Trustee reserved all rights with respect to AVIVA’s contention that \$4,355.87 was owed for the period July 20, 2009 through November 20, 2009, because such calculation was inconsistent with AVIVA’s August 4, 2009 correspondence. Id. Upon information and belief, AVIVA cashed and deposited the Trustee’s \$27,020.62 check.

ANSWER: Aviva admits that on or about November 19, 2009, the Trustee mailed a cashier’s check to Aviva in the amount of \$27,020.62. Aviva further states that Exhibit H speaks for itself. Aviva further admits that pursuant to its normal process, the cashier’s check was cashed and deposited into a holding account. However, Aviva affirmatively states that all funds represented by the cashier’s check were not retained by Aviva, but rather were refunded and tendered back to the Trustee. Aviva further admits that the Trustee took the position that he timely satisfied all obligations to maintain the Policy. However, Aviva specifically denies that the Trustee timely acted to prevent the lapse of the Policy. Aviva denies any other allegation contained in paragraph 27.

28. On December 4, 2009, AVIVA delivered a letter to the Trustee’s counsel, in which it: (a) acknowledged receipt of the Trustee’s \$27,020.62 payment; (b) generally acknowledge the applicability of 11 U.S.C. § 108(b); (c) admitted that it received the October 30 Check within 60 days after the Petition Date; but (d) for the first time refuted in writing the Trustee’s contention that he had timely paid all obligations under the Policy because the October 30 Check “did not constitute an acceptable form of payment to AVIVA due to Patriot Act procedures.” See Exhibit I attached hereto.

ANSWER: Aviva states that Exhibit I speaks for itself. Aviva denies any other allegation contained in paragraph 28.

29. Prior to his receipt of AVIVA's letter on November 6, 2009 (see Ex. E), AVIVA never informed the Trustee that federal law or other rules implemented by AVIVA limited the manner in which payments could be made on account of insurance premium obligations. Upon information and belief, AVIVA also never informed Houston Tanglewood Partners, LLC or any other of the Debtors that such federal law or rules applied to premium payments.

ANSWER: Aviva denies the allegations contained in paragraph 29 for lack of information sufficient to form a belief.

30. On December 11, 2009, the Trustee delivered a letter to AVIVA in which he, among other things, questioned whether AVIVA had justifiably rejected payment of the October 30 Check. See Exhibit J attached hereto.

ANSWER: Aviva states that Exhibit J speaks for itself. Aviva denies any other allegation contained in paragraph 30.

31. On December 15, 2009, AVIVA delivered a letter to the Trustee in which it refused to reinstate the Policy and indicated that it would be returning the premium payments made by the Trustee. See Exhibit K attached hereto.

ANSWER: Aviva admits the allegations contained in paragraph 31 and further states that Exhibit K speaks for itself.

32. On December 22, 2009, more than a month after accepting and depositing payments from the Trustee and only after the Trustee inquired about AVIVA's receipt of the subject payments, AVIVA delivered a check to the Trustee in the amount of \$51,111.02, which represents the amount of premiums paid by the Trustee on account of the Policy.

ANSWER: Aviva admits that on or about December 22, 2009, it tendered an Aviva check to the Trustee in the amount of \$51,111.02 which represented the full amount of monies tendered by the Trustee to Aviva on account of the Policy. Aviva denies any other allegation contained in paragraph 32.

COUNT I

(Request for Declaratory Judgment)

33. The Trustee incorporates by reference the allegations contained in paragraphs 1 through 32 hereof.

ANSWER: Aviva restates its answers to paragraphs 1-32 as if fully set forth herein.

34. Pursuant to 11 U.S.C. § 108(b), “if applicable nonbankruptcy law...or an agreement fixes a period within which the debtor ... may ... cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of -- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 60 days after the order for relief.”

ANSWER: Aviva admits that the Trustee has correctly set forth the excerpted text of 11 U.S.C. § 108(b). Aviva denies any other allegation contained in paragraph 34.

35. Because the Policy was purportedly scheduled to lapse on September 19, 2009 – 17 days after the Petition Date – the Trustee had a least 60 days following the Petition Date to satisfy the Premium Obligation and maintain the Policy – November 1, 2009.

ANSWER: Aviva admits that the Trustee had until November 1, 2009 within which to pay premiums due on the Policy and prevent its lapse. Aviva denies any other allegation contained in paragraph 35.

36. As admitted by AVIVA, the Trustee tendered the October 30 Check to AVIVA to satisfy the Premium Obligation within 60 days following the Petition Date.

ANSWER: Aviva admits that on or about October 30, 2009, the Trustee tendered premiums owed on the Policy using a payment method — a starter check — which Aviva could not accept pursuant to obligations of federal law. By way of further answer, Aviva states the Trustee’s tender of a starter check did not satisfy the Trustee’s obligations to prevent the lapse of the Policy.

37. AVIVA unjustifiably rejected the October 30 Check.

ANSWER: Aviva denies the allegations contained in paragraph 37.

38. Even if AVIVA was justified in rejecting the October 30 Check, the Trustee promptly cured the purported defect in payment pursuant to AVIVA's request and AVIVA's purported rejection does not constitute a failure to perform under 11 U.S.C. § 108(b).

ANSWER: Aviva denies the allegations contained in paragraph 38.

39. Accordingly, AVIVA's assertion that the Policy lapsed is erroneous and the Policy remains in full force and effect.

ANSWER: Aviva denies the allegations contained in paragraph 39.

40. Because the Trustee maintains that the \$5,000,000 Policy remains in full force and effect and AVIVA asserts that the Policy lapsed, the parties have adverse legal interests.

ANSWER: Aviva admits the parties to this case have adverse legal interests.

41. The Trustee's and AVIVA's adverse legal interests are of sufficient immediacy because the Policy remains an asset of one or more of the Debtors' estates, and the Trustee cannot otherwise obtain any benefit from the Policy absent a declaration determining the status of the Policy.

ANSWER: Aviva denies the allegations contained in paragraph 41.

42. The Trustee has made repeated attempts to resolve this dispute without Court intervention to no avail.

ANSWER: Aviva admits the allegations contained in paragraph 42.

43. Accordingly, this action presents an actual controversy within the meaning of 28 U.S.C. § 2201(a).

ANSWER: Aviva admits the allegations contained in paragraph 43.

WHEREFORE, Aviva Life and Annuity Company respectfully requests that the Court confirm that Aviva Life and Annuity Company Policy No. B05020454 properly lapsed pursuant to its terms and 11 U.S.C. § 108(b) and issue a declaratory judgment that the Policy is lapsed and of no legal effect, and granting Aviva Life and Annuity Company such other and further relief as the Court deems just and proper.

Dated: April 8, 2010

AVIVA LIFE AND ANNUITY COMPANY,

By: /s/ Craig M. Bargher

Craig M. Bargher

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SERVICE LIST

I hereby certify that a true and correct copy of Aviva Life and Annuity Company's Amended Answer to Complaint was served upon the following via the delivery methods described below on this **8th** day of **April, 2010**. The documents delivered by U.S. Mail were mailed in a duly addressed, envelope and deposited in the U.S. mail reciprocal at 303 W. Madison Street, Chicago, Illinois, on or before the hour of 5:00 p.m. this **8th** day of **April, 2010**.

	Via Delivery Method		Via Delivery Method
Sandra Rasnak Richard Friedman Office of the U.S. Trustee 219 S. Dearborn Street, Room 873 Chicago, Illinois 60604-1702 sandra.rasnak@usdoj.gov richard.c.friedman@usdoj.gov	Court's ECF notice	David T. B. Audley Carly Jones Chapman & Cutler 111 W. Monroe Street, Suite 1600 Chicago, Illinois 60603 audley@chapman.com cmjones@chapman.com	Court's ECF Notice
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