IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
AIG FINANCIAL PRODUCTS CORP.,[1]	Case No. 22-11309 (MFW)
Debtor.	

EMPLOYEE PLAINTIFFS' PRELIMINARY STATEMENT IN RESPONSE TO THE DEBTOR'S CHAPTER 11 CASE AND FIRST-DAY FILINGS

The Employee Plaintiffs[2], by and through their undersigned counsel, submit this Preliminary Statement in Response to the Debtor's Chapter 11 Case and First Day Filings and in support hereof, respectfully represent:

1. Through this Chapter 11 filing, AIG Inc. ("AIG") and AIG Financial Products Corp. ("AIGFP") are purporting to "reorganize" an entity that does not operate as a going concern, has no business to rehabilitate, no direct employees, and no non-insider creditors other than the Employee Plaintiffs—in what the Employee Plaintiffs will demonstrate is an abuse of the bankruptcy process.

2. AIG is the world's leading insurance organization. It reported well over $9 billion in net income in 2021[3] and "returned $3.7 billion to shareholders . . . through stock repurchases and . . .

[1] The Debtor in this case, along with the last four digits of the Debtor's federal tax identification number, is: AIG Financial Products Corp. (9410). The Debtor's address is 50 Danbury Road, Wilton, Connecticut 06897.

[2] The Employee Plaintiffs are: Lee Arthurs; David Ackert; Mitchell Bell; Erik Bengtson; Paul Bradshaw; Thomas Buttke; John Cappetta; David Chang; Robert Chang; Jason DeSantis; Richard Fabbro; Kenneth Farrar; Jonathan Fraade; Carl Giesler Jr.; James Haas; Charles Hsieh; Thomas Kalb; Thomas Kushner; Robert Leary; Jonathan Liebergall; Nathaniel Litwak; Brendan Lynch; Alfred Medioli; Matthew Mihaly; Joann Palazzo; Eugene Park; Andrew Partner; Carl Peterson; Steven Pike; Thomas Plagemann; Robert Powell; Daniel Raab; Ann Reed; Paul Schreiner; Dmitry Satanovsky; Mary Heather Singer; Keith Stein; Frank Strohm; Timothy Sullivan Jr.; Chris Toft; Joe Tom; Ryan Vetter; Steven Wagar; Thomas Ward; Martin Wayne; and James Wolf.

[3] United States Securities and Exchange Commission, AIG Form 10-K at 77 (December 31, 2021) https://aig.gcs-web.com/static-files/3470eaef-f868-4b12-bde0-5cd269cbad99; AIG Annual Report at 4 (2021) https://www.aig.com/content/dam/aig/america-canada/us/documents/investor-

dividends" in the same year.[4] The putative Chapter 11 debtor, AIGFP, is a wholly-owned subsidiary of AIG. Notwithstanding the glowing financial health of its parent and the financial support it has always received from AIG (even through the financial crisis of 2008), AIGFP has now suddenly filed for Chapter 11 bankruptcy based on a purported loan it owes its parent.

3. The real impetus for AIGFP's bankruptcy filing is to avoid repaying certain deferred compensation it owes to the Employee Plaintiffs, 46 former employees from whom AIGFP borrowed approximately $194 million during the 2008 financial crisis but has never repaid. The Employee Plaintiffs have sued AIGFP to recover those amounts in a case that has been pending in Connecticut state court since 2019 (the "Connecticut Action").

4. Significantly, in the Connecticut Action, AIGFP was ordered to produce by December 14—*i.e.*, the date of the Chapter 11 petition—documents that it tried to withhold as privileged, relating to its treatment of a purported loan with AIG and the circumstances of its failure to pay its employees. Instead of complying with that order, AIGFP commenced this case in a blatant attempt to shift what essentially is a two-party dispute to this forum, dressing it up as an actual reorganization. AIGFP's proposed Chapter 11 plan pits AIG and AIGFP, on the one hand, against the Employee Plaintiffs, on the other.[5]

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relations/2022/aig-annual-report-2021.pdf.

[4] *Id.* at 1 https://www.aig.com/content/dam/aig/america-canada/us/documents/investor-relations/2022/aig-annual-report-2021.pdf.

[5] Under the proposed plan, the Employee Plaintiffs are the only non-insider creditors who are impaired and can vote to accept the plan. *See* Plan of Reorganization for AIG Financial Products Corp. Under Chapter 11 of the Bankruptcy Code [Dkt. 6], at 13–14. Indeed, AIG is the *single* other creditor entitled to vote under the plan. *Id.* Moreover, the Employee Plaintiffs are the *only* creditors identified in AIGFP's Official Form 204 as non-insider unsecured creditors with the largest claims. *See* Chapter 11 Voluntary Petition [Dkt. 1], at 16. The Employee Plaintiffs reserve all rights and arguments in connection with the filings made by AIGFP on the Petition Date, including with respect to the characterization of AIG's purported claim against AIGFP as debt.

5. During the 2008 financial crisis, AIGFP borrowed hundreds of millions of dollars of already-earned compensation that employees, including the Employee Plaintiffs, deferred into two deferred compensation plans (the Deferred Compensation Plan, "DCP," and Special Incentive Plan, "SIP"; together, the "Plans"). The Plans provided that AIGFP could borrow from its employees' deferred compensation accounts, but AIGFP had the unequivocal obligation to restore those account balances after borrowing from them. At the same time, AIG decided to wind down AIGFP and to use the proceeds of that wind-down to pay off loans it received from the federal government, which is well documented as AIG's "bailout."[6]

6. Many of the Employee Plaintiffs stayed with AIGFP through the financial crisis and helped it wind down, thus mitigating the impact of the financial crisis on AIG and—more importantly—U.S. taxpayers, who funded AIG's bailout. By 2013, with the Employee Plaintiffs' help, AIG had repaid the federal government with interest and returned to profitability. And though, by this time, AIGFP was well-positioned to repay its employees, it never did so. Instead, it took affirmative steps to avoid its obligations under the Plans.

7. In 2019, the Employee Plaintiffs brought the Connecticut Action against AIGFP in Connecticut state court, seeking damages for breach of contract, breach of the duty of good faith, and violations of Connecticut labor law as a result of AIGFP's refusal to pay them the compensation due to them under the Plans, including the compensation AIGFP promised certain of them in connection with the financial crisis. The Employee Plaintiffs seek over $500 million in total damages related to AIGFP's breaches of its obligations.

8. In 2022, the Employee Plaintiffs filed a motion in the Connecticut Action seeking an order for AIGFP to produce certain key documents related to (a) a purported recapitalization of a

[6] *See, e.g.*, United States Department of the Treasury, AIG Program Status, https://home.treasury.gov/data/troubled-assets-relief-program/aig/status.

"loan" AIGFP claims it owes to its parent (the same "debt" that AIGFP is using as a pretext for this bankruptcy), and (b) AIGFP's obligation to restore the Employee Plaintiffs' account balances. AIGFP lost that motion. Specifically, after an *in camera* review of exemplar documents, the Connecticut court found that AIGFP had waived privilege on two key subject matters relevant to the Employee Plaintiffs' claims, noting that:

> With respect to the communications relating to AIGFP recapitalization and the restoration of the [Plans], this Court finds that [AIGFP] has waived the attorney-client privilege with respect to such subject matters . . . . Fairness dictates that the disclosed and undisclosed communications on this subject matter be considered together as it prevents defendant from using the privilege as both a shield and sword.[7]

The Connecticut court set a deadline of December 14, 2022 for AIGFP to produce the documents previously withheld on the basis of privilege.

9. Rather than comply with this court order, AIG and AIGFP are now weaponizing the Bankruptcy Code in bad faith to try to (1) take advantage of the automatic stay of the Connecticut Action, (2) shield AIG, AIGFP, and their executives from discovery and previously ordered disclosures, and (3) dilute the claims of the *only* non-insider unsecured creditors of AIGFP identified in the petition: AIGFP's former employees.

10. Indeed, while telling its story in its first day papers, AIGFP did not consent to the Employee Plaintiffs' use in this case of *any* of the documents from the Connecticut Action—even those that AIGFP previously produced to the Employee Plaintiffs. The Employee Plaintiffs requested such consent from AIGFP before filing this statement, in order to share with this Court information that goes to the heart of AIGFP's bankruptcy filing: the true nature of AIGFP's financial arrangement with its parent, and AIGFP and AIG's misconduct in using that financial arrangement as a weapon against the Employee Plaintiffs. AIGFP has withheld its consent, and the Employee Plaintiffs have

[7] A true and correct copy of the Connecticut state court order is attached as Exhibit A.

therefore limited this filing to materials in the public domain in order to comply with the protective order in the Employee Action.[8] But even based on the public record, the timing, tactics, and circumstances of this Chapter 11 filing show that it has nothing to do with reorganizing, rehabilitating and/or maximizing value to creditors.

11. Indeed, AIGFP's Chapter 11 filing can serve no reorganizational purpose at all. It has no direct employees and does not operate as a going concern[9]—*i.e.*, AIGFP has no business to rehabilitate through the Chapter 11 process. Moreover, any Chapter 11 plan AIGFP could attempt to propose is doomed to fail, as the Employee Plaintiffs are the only non-insider creditors identified in the petition that could vote on any plan.[10] The plan is also deficient for classifying as debt AIG's purported "loan" to AIGFP. That "loan"—which has no maturity date or interest rate—is nothing more than disguised equity.

12. In addition to obfuscating the true reason for this filing, AIGFP's first day papers also rely on a 2014 English litigation, which raised similar claims as the Connecticut Action. AIGFP failed to inform this Court, however, of the inaccuracies and incomplete information provided to the English court in that trial. Significantly, the English court did not have the benefit of expert testimony on key issues, nor did it have the benefit of key documents related to the Plans and their restoration that

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[8] As of the time of this filing, attorneys for AIGFP have merely indicated that they are evaluating the Employee Plaintiffs' request. Assuming AIGFP continues to withhold its consent, the Employee Plaintiffs will address that issue, as well as whether AIGFP violated the protective order in the Connecticut Action (*e.g.,* by using Plaintiffs' confidential submissions and/or expert reports in the Connecticut Action to prepare this bankruptcy case or by sharing those materials with its parent, AIG, without permission from the Employee Plaintiffs).

[9] *See* Declaration of William C. Kosturos [Dkt. 2], at 11, 16.

[10] *See* 11 U.S.C. § 1129(a)(10) (requiring that "at least one class of claims that is impaired under the plan [must have] accepted the plan, *determined without including any acceptance of the plan by any insider*" (emphasis added)).

AIGFP produced in the Connecticut Action but never produced in the English litigation.[11] Many of these same documents were initially withheld from the Employee Plaintiffs and some are subject to the Connecticut court's production order.

13. Indeed, in the Connecticut Action, AIGFP conceded that the English court's decision was not binding on the Employee Plaintiffs or the Connecticut court (presumably because, for among other reasons, none of the plaintiffs in the Connecticut Action were plaintiffs in the English proceeding).[12] And, in fact, the Connecticut court denied AIGFP's motion to strike the Employee Plaintiffs' claims and allowed all of the claims to proceed to discovery and summary judgment.[13] The Employee Plaintiffs will further correct AIGFP's mischaracterization of the Connection Action and the English litigation, and provide the Court with the relevant record, at the appropriate time.

14. Against this backdrop, the Employee Plaintiffs will soon move to dismiss the Chapter 11 case, as having been filed in bad faith and without a valid reorganizational purpose. Alternatively, in the event that this case remains before the Court and is not dismissed for bad faith, the Employee Plaintiffs submit that an independent trustee—either following conversion to Chapter 7 or upon appointment of a Chapter 11 trustee—should be charged with investigating, among other things, the apparent substantial transfers and dissipation of AIGFP's assets before this Chapter 11 filing and, if appropriate, pursue claims against AIG and other insiders for their role in this scheme.

15. The Employee Plaintiffs respectfully urge the Court to consider these issues and their

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[11] *See* Stipulation as to Certain Records in the UK Action, dated November 9, 2022, as between AIGFP and the Employee Plaintiffs, attached as Exhibit B (stipulating that certain documents were not produced in the English litigation).

[12] *See* Motion to Strike Oral Argument Transcript, dated March 5, 2021, attached as Exhibit C, at Tr. 107:19-23; 125:14-15; 136:21-23.

[13] *See* Memorandum of Decision on Motion to Strike, dated May 24, 2021, attached as Exhibit D (denying Defendant AIGFP's Motion to Strike).

forthcoming motions when setting any schedules in connection with this case. The Employee Plaintiffs otherwise expressly reserve all rights to seek all appropriate relief in this case.

Dated: December 15, 2022
Wilmington, Delaware

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EXHIBIT A

ORDER 429710

DOCKET NO: FSTCV196046057S

SUPERIOR COURT

ARTHURS, LEE Et Al
V.
AIG FINANCIAL PRODUCTS CORP.

JUDICIAL DISTRICT OF STAMFORD
AT STAMFORD

11/29/2022

ORDER

ORDER REGARDING:
08/16/2022 165.00 MOTION FOR ORDER OF COMPLIANCE – PB SEC 13-14 (INTERR/PROD – 13-6/13-9)

The foregoing, having been considered by the Court, is hereby:

ORDER:

MEMORANDUM OF DECISION

The plaintiffs have moved to compel the production of certain communications which defendant AIG Financial Products Corporation ("AIGFP") has claimed are privileged. In particular, the parties have identified sixteen documents from defendant's privilege log which are partially or wholly redacted due to the attorney-client privilege. At issue before this Court is whether the proposed redacted portions of the sixteen documents are privileged, and if so, whether defendant has waived the attorney-client privilege relating to the recapitalization of AIGFP and the restoration of benefits under the Deferred Compensation Plan ("DCP") and Special Incentive Plan ("SIP") that are the subject of claims made by the plaintiffs in this action.

In connection with this dispute, the Court entered an order for an in-camera review of the sixteen documents. The defendant produced such records to the Court on November 18, 2022, and the Court has reviewed these documents in-camera.

"In Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal adviser to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. . . . The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice. . . . The privilege applies, however, only when necessary to achieve its purpose; it is not a blanket privilege." (Citation omitted; internal quotation marks omitted.) State v. Kosuda-Bigazzi, 335 Conn. 327, 342, 250 A.3d 617 (2020).

It is well-established that "[n]ot every communication between attorney and client falls within the [attorney-client] privilege." Harrington v. Freedom of Information Commission, 323 Conn. 1, 14 (2016). Common law in Connecticut extends the attorney-client privilege to communications when the client is a corporate entity. Blumenthal v. Kimber Mfg., Inc., 265 Conn. 1, 10. There are four criteria that must be present, in the corporate context, in order for the privilege to attach: "(1) the attorney must be acting in a professional capacity for the [corporation]; (2) the [communication] must be made to the attorney by current employees or officials of the [corporation], (3) the [communication] must be relate to the legal advice sought by the [corporation] from the attorney, and (4) the [communication] must be made in confidence." (Internal quotation marks omitted.) Id., 10-11. The attorney-client privilege "protects only those disclosures - necessary to obtain informed legal advice - which might not have been made absent the privilege." Shew v. Freedom of Information Commission, 245 Conn. 149, 157-58 (1998).

In determining whether a party has waived attorney-client privilege, the Court considers: (1) whether the

waiver was intentional; (2) whether both disclosed and undisclosed communications concern the same subject matter; and (3) whether fairness dictates considering them all together. Ghio v. Liberty Ins. Underwriters, Inc., 212 Conn. App. 754, 771, 276 A.3d 984, cert. denied, 345 Conn. 909 (2022). "[T]he fairness principle, which is often expressed in terms of preventing a party from using the privilege as both a shield and sword . . . In practical terms, this means that parties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials." (Internal quotation marks omitted.) Id., 773.

It is well established that "voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege." (Internal quotation marks omitted.) State v. Taft, 258 Conn. 412, 421, 781 A.2d 302 (2001). The Connecticut Appellate Court has recognized the subject matter waiver rule of attorney-client privilege and has held that "the voluntary disclosure of a privileged attorney-client communication constitutes a waiver of the privilege as to all other communications concerning the same subject matter when the trial court determines that the waiver was intentional and that fairness dictates that the disclosed and undisclosed communications be considered together." Ghio v. Liberty Ins. Underwriters, Inc., supra, 212 Conn. App. 775-76. Because the waiver must be intentional, "an inadvertent disclosure of protected information can never result in a subject matter waiver." (Internal quotation marks omitted.) Id., 776. Moreover, a party waives privilege when it "specifically pleads reliance on an attorney's advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication, or specifically places at issue, in some other manner the attorney-client relationship." (Internal quotation marks omitted.) Id., 773.

In this case, the defendant claims that its counsel's advice relating to the restoration of benefits under the plaintiffs' DCP and SIP Plans and the recapitalization of AIGFP are privileged and the plaintiffs are not entitled to seek production of counsel's communications with the defendant on this subject matter. The privilege log produced by the defendant generally identifies the subject matter of the redacted materials as "AIGFP Recapitalization, Issues Related to AIGFP DCP and SIP Programs and Planned Recapitalization", "Connecticut Deferred Tax Asset for AIGFP", and "Negative Equity." (Docket No. 193.00.)

Upon review of the sixteen documents, this Court agrees in part with defendant that certain attorney-client communications present in these records relating to the issue of statutes of limitation are privileged. Redacted portions of the following documents relating to such subject matter should not be produced to the plaintiffs. (Document Nos. 2, 4, 7, 9, 10, 11, and 15.)

With respect to the communications relating to AIGFP recapitalization and the restoration of the DCP and SIP Programs, this Court finds that defendant has waived the attorney-client privilege with respect to such subject matters by producing portions of communications to AIG's in-house counsel relating to advice given by outside counsel Patrick Shea as to these subject matters. (See i.e. Document Nos. 6, 9/2/10 Herzog email to Michael Leahy, corporate counsel) Both the disclosed and undisclosed communications concern the same subject matter. Fairness dictates that the disclosed and undisclosed communications on this subject matter be considered together as it prevents defendant from using the privilege as both a shield and sword.

The Court further finds that Document Nos. 1, 3, 8 and 13 are not privileged and should be produced to the plaintiffs in their entirety and Document No. 16 is privileged and should not be produced.

Based on the foregoing, the Court enters the following orders:

(1) The documents listed on the Privilege Log as Document Nos. 1, 3, 8 and 13 are not privileged. These records shall be produced in their entirety to the plaintiffs by 12/14/22;

2) Certain communications in Document Nos. 2 (Item No. 4), 4, 9, 10, 11 and 15 relating to the issue of statutes of limitation are privileged and shall not be produced to the plaintiffs. Document No. 16 is privileged and shall not be produced to the plaintiff; and

(3) The Court finds that the attorney-client privilege has been intentionally waived with respect to the

subject matter of the recapitalization of AIGFP and the restoration of the DCP and SIP plans (including communications relating to filings with the Federal Reserve Bank of New York). Thus, the sections in Document Nos. 2, 4, 5, 6, 7, 9, 10, 12, 14, and 15 that are currently redacted relating to such subject matters shall be produced in unredacted form to the plaintiffs by 12/14/22.

Superior Court Results Automated Mailing (SCRAM) Notice was sent on the underlying motion.

429710

Judge: SHEILA ANN OZALIS
Processed by: Sharnet Jumpp

This document may be signed or verified electronically and has the same validity and status as a document with a physical (pen-to-paper) signature. For more information, see Section I.E. of the *State of Connecticut Superior Court E-Services Procedures and Technical Standards* (https://jud.ct.gov/external/super/E-Services/e-standards.pdf), section 51-193c of the Connecticut General Statutes and Connecticut Practice Book Section 4-4.

EXHIBIT B

Docket No. X08-FST-CV-19-6046057-S

LEE ARTHURS; DAVID ACKERT; MITCHELL BELL; ERIK BENGTSON; PAUL BRADSHAW; THOMAS BUTTKE; JOHN CAPPETTA; DAVID CHANG; ROBERT CHANG; JASON DESANTIS; RICHARD FABBRO; KENNETH FARRAR; JONATHAN FRAADE; CARL GIESLER JR.; JAMES HAAS; CHARLES HSIEH; THOMAS KALB; THOMAS KUSHNER; ROBERT LEARY; JONATHAN LIEBERGALL; NATHANIEL LITWAK; BRENDAN LYNCH; ALFRED MEDIOLI; MATTHEW MIHALY; JOANN PALAZZO; EUGENE PARK; ANDREW PARTNER; CARL PETERSON; STEVEN PIKE; THOMAS PLAGEMANN; ROBERT POWELL; DANIEL RAAB; ANN REED; PAUL SCHREINER; DMITRY SATANOVSKY; MARY HEATHER SINGER; KEITH STEIN; FRANK STROHM; TIMOTHY SULLIVAN JR.; CHRIS TOFT; JOE TOM; RYAN VETTER; STEVEN WAGAR; THOMAS WARD; MARTIN WAYNE; JAMES WOLF, Plaintiffs, v. AIG FINANCIAL PRODUCTS CORP., Defendant.	SUPERIOR COURT COMPLEX LITIGATION DOCKET J.D. OF STAMFORD-NORWALK NOVEMBER 9, 2022

STIPULATION AS TO CERTAIN RECORDS IN THE UK ACTION

Defendant, AIG Financial Products Corp. ("AIGFP"), hereby stipulates that certain documents identified by Plaintiffs herein were not produced in the action captioned *Tobias Gruber and 22 others v. AIG Management France S.A., AIG Financial Products Corp. and American International Group, Inc.*, number CL-2014-000921 (the "UK Action"). A list of these documents is set forth below:

1. AIGFP_US00942069
2. AIGFP_US00942071
3. AIGFP_US00942065

4. AIGFP_US00942066
5. AIGFP_US00942336
6. AIGFP_US00942343
7. AIGFP_US00942350
8. AIGFP_US00942347
9. AIGFP_US00939840
10. AIGFP_US00942076
11. AIGFP_US00942087
12. AIGFP_US00942088
13. AIGFP_US00942194
14. AIGFP_US00243021
15. AIGFP_US00067018
16. AIGFP_US00497703
17. AIGFP_US00504121
18. AIGFP_US00504123
19. AIGFP_US00504114
20. AIGFP_US00649750
21. AIGFP_US00649751
22. AIGFP_US00649752

Though this list should capture all documents that Plaintiffs claim are relevant to AIGFP's Fifth Special Defense to the Fourth Count of its Amended Answer that were not produced in the UK Action, Plaintiffs reserve the right, as they continue to review the production and depending on the Court's rulings on Plaintiffs' Motion for an Order of Compliance pending before the Court

as of the date of this stipulation, to identify additional documents that Plaintiffs claim are relevant to AIGFP's Special Defense that AIGFP agrees shall be added to the above list to the extent that such documents were not produced in the UK Action.

The parties agree that this stipulation may be admitted into evidence and may be considered by the Court. In so agreeing, AIGFP does not concede that this stipulation has any relevant information.

Date: November 9, 2022
New York, New York

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EXHIBIT C

NO: FST-CV19-6046057S	:	SUPERIOR COURT
LEE ARTHURS, ET AL	:	JUDICIAL DISTRICT STAMFORD/NORWALK
v.	:	AT STAMFORD, CONNECTICUT
AIG FINANCIAL PRODUCTS CORP.	:	MARCH 5, 2021

BEFORE THE HONORABLE SHIELA OZALIS, JUDGE

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Recorded By:
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(S. Jerry-Collins begins typing)

THE COURT: Good morning, everyone. We're here on the matter of Lee Arthurs, et al versus AIG Financial Products, Court docket number X08 19 6046057. And there's feedback -- someone --

(Pause)

COURT MONITOR: Yes, Your Honor. I'm getting that as well. So I'd like everyone to mute their microphones, please. Thank you. (Pause) All right, Your Honor. I think you're going to -- I believe it's coming from Attorney Kiernan's side. (Chuckle) I'm sorry, but all of my indicators is, it's coming from his end.

THE COURT: Okay. All right. So I'm going to go one by one. We'll start with plaintiff's counsel, and then move into defendant's counsel. If you could unmute your mic as we go along. I will start with you, Attorney Freiman for plaintiffs.

ATTY. FREIMAN: Yes. Good morning, Your Honor. Jonathan Freiman of Wiggin and Dana for defendant AIG. And with me today --

THE COURT: I'm sorry -- defendant, AIG. Sorry about that.

ATTY. FREIMAN: With me today is Mr. John Kiernan -- Attorney John Kiernan, who will be presenting the argument.

THE COURT: Okay. Thank you. All right. And

who do we have representing plaintiff's counsel?

ATTY. SLOSSBERG: Good morning, Your Honor. David Slossberg, Hurwitz Sagarin Slossberg and Knuff, and I'm here just wanted to introduce to Your Honor Attorneys Steven Perlstein and George Stamatopoulos who will be handling the argument today.

Also with me -- with us for the plaintiffs is my colleague, David Shufrin. I would ask Your Honor, the counsel, Mr. Perlstein was intending, with Your Honor's permission, to address arguments as to counts one and two, and Attorney Stamatopoulos as to counts three and four.

THE COURT: All right. That's fine. I'm going to ask everyone who is not participating in the arguments to please take your video down. And for those attorneys who are participating in the arguments, please keep your video up.

And so, we're going to start with you, Attorney Kiernan. This is your motion to strike, or AIG's motion to strike. And it's defendant, AIG Financial Products Corp., for the record, that has made the motion to strike the -- counts one through four.

Go ahead.

ATTY. KIERNAN: Yes, Your Honor. Thank you and good morning. Your Honor, we've lost video with you, or at least I have. Is that intentional, or is that a glitch?

THE COURT: No. My video is still showing. I don't know. Can everyone else see my video?

ATTY. SHUFRIN: I can, Your Honor.

THE COURT: You can?

ATTY. SHUFRIN: This is David Shufrin. I can.

ATTY. PERLSTEIN: I -- I am actually with Mr. Kiernan. I cannot. I see an OS.

THE COURT: Attorney Kiernan?

ATTY. KIERNAN: No, for you. Your initials.

THE COURT: Oh, you don't see me?

ATTY. FREIMAN: Correct.

ATTY. PERLSTEIN: No.

COURT MONITOR: Judge, this is Linda, the monitor. I can see you. I can see everyone.

THE COURT: Okay.

COURT MONITOR: You're there. So it might be on their end.

THE COURT: Okay. I can leave and sign back in if you like -- and try that.

ATTY. KIERNAN: However you want to proceed, Your Honor, if you can do that, or I can --

(Cross-talk)

THE COURT: All right. Well, let me leave and see if I could -- I'm going to leave temporarily. I'll be right back in in about 30 seconds.

COURT MONITOR: Judge. Judge, this is Linda. Hang on one second. Attorney Kiernan, do you see her

on the bottom anywhere -- of your screen?

ATTY. KIERNAN: No, I have the same OS initials as Mr. Perlstein is seeing.

COURT MONITOR: Okay. Can you right click on the OS initials? And is there something where you can pin it?

ATTY. KIERNAN: Clicking on it and getting nothing.

COURT MONITOR: Okay. All right.

(Pause)

THE COURT: All right. I'm back in.

ATTY. KIERNAN: I've got you, but unfortunately, you're covered by me.

ATTY. PERLSTEIN: I think you can flip that up. I just did the same thing. You can move where you are up.

(Pause)

ATTY. KIERNAN: Oh, there. Thank you very much. Your Honor, I can now see you. And you're not getting feedback from me?

THE COURT: No, I'm not getting feedback, but I do need you to speak a little louder, because I can barely hear you, Attorney Kiernan.

ATTY. KIERNAN: I certainly will. And if you have any trouble hearing me, please raise your hand, and I'll speak up. It's not something I'm usually accused of defaulting on.

So thank you, Your Honor. Good morning, and may it please the Court. Of course my main purpose here is to address Your Honor's questions. And so --

THE COURT: Okay.

ATTY. KIERNAN: -- I'm prepared to proceed any way you want, including by going right into your questions, or proceeding --

THE COURT: All right. Actually, my first question of the day is for Attorney Slossenberger (As said) who is doing counts three and four; correct?

ATTY. STAMATOPOULOS: It's actually Stamatopoulos, Your Honor.

THE COURT: Oh, Stamatopoulos. I'm sorry.

ATTY. STAMATOPOULOS: You're first --

THE COURT: It's on count four on the wage claim? Okay. My question for you, Attorney Stamatopoulos is, I know you haven't had the opportunity to formerly reply to the reply refiled by defendant, AIG Financial Products.

With respect to the Supreme Court cases that they refer to, they were not cited in your opposition. They say that the Supreme Court cases made in the Weins versus CitiGroup case, Association Resources Inc. versus Walcase (Sounds like). The Ziotas versus Riordan (Sounds like) law cases that our Supreme Court came out with around 2010, regarding this very issue.

I'd like to hear your position with respect to those, and how the rulings by the Supreme Court in this State on the issue of bonuses ties to your argument that what the bonus here was wages?

ATTY. STAMATOPOULOS: Certainly, Your Honor. So Your Honor, at a very high level our response is that the deferred compensation at issue, both pursuant to the SIP as well as the DCP are wages, even in view of the trilogy that AIGFP cites.

As an initial matter, with respect to the most recent of those three cases, the Association Resources case, the Court there found that bonuses that were tied to profits actually constituted wages where they were non-discretionary, and also where the amounts were determinate.

That's precisely the case here.

THE COURT: Yes. But the issue and -- there was a formula set forth in the contract for the bonus determination that tied to profits. Where can you point the Court to that there's a similar provision for the bonus here in this case?

ATTY. STAMATOPOULOS: Well, just to step a -- just to take a step back, Your Honor, is an initial matter. The bonus -- the deferred compensation here had several components. First of all, there was a notional bonus amounts. And that is not set forth in the DCP in the deferred compensation agreement.

And then there was also an additional return payment that AIGFP correctly points out, was tied to distributable income.

THE COURT: And that's in section 3.04; correct?

ATTY. STAMATOPOULOS: That is correct, Your Honor. Even though that amount -- that the amount of distributable income is discretionary. These amounts were actually vested in plaintiff's account. And by virtue of being vested in plaintiff's account, they're not just knowable. They're not just determinable. They're actually note amounts.

THE COURT: All right. And where can you point to me in the agreement that says, that these are vested in the plaintiff's accounts?

ATTY. STAMATOPOULOS: Your Honor, if you go to the DCP at section 107, you will see that these amounts were credited to accounts in plaintiff's names. Furthermore, the vesting is not just by virtue of depositing nominally, the amounts and accounts.

It's also by virtue of the operation of the agreements which required AIGFP by a date certain in 2013, to repay our clients these amounts. So the vesting occurs in two -- or actually, in three --

THE COURT: Well, there's an argument on that December 2013th date -- right -- whether or not there are funds and able to do, whether that's just a final

end date. Either they return -- I mean -- AIG argues, that was it. If the funds were not returned by that date, you were done. And you have argued the reverse; correct?

ATTY. STAMATOPOULOS: That is correct. I would add, Your Honor that, if you read the entirety of that provision -- we refer to it as the latch provision -- you will seem Your Honor, that AIGFP was obligated to push back those dates. Provided they were able to do so in compliance with section 419.

So --

THE COURT: I'm sorry. Your voice dropped off there. Can you please repeat that?

ATTY. STAMATOPOULOS: I apologize. So I'll just take it from the top. If you read the entirety of that provision, to which we referred -- as the latch provision, you'll see that there is indeed, a provision -- lapse by December -- if they're not restored by December 2013.

But that's not where the provision ends. The provision goes on to say that if AIGFP determines that it can extend those lapse dates, and stay in compliance with section 409A, which is -- (Indiscernible)

THE COURT: Your voice dropped off, and Attorney Perlstein, or somebody is moving papers.

ATTY. STAMATOPOULOS: Yes.

THE COURT: If you could take your microphone down; just mute your microphone. It's interfering with what we're hearing from Attorney Stamatopoulos. Go ahead, Attorney Stamatopoulos.

ATTY. STAMATOPOULOS: Certainly, Your Honor. So Your Honor, what I was saying is that, the lapse provision in the DCP indeed provides that -- the rights lapsed by -- if they're not restored by December 31st, 2013. But it goes on to say that, AIGFP was obligated to extend those dates if it determined that it could do so, while staying in compliance with section 409a of the Internal Revenue code.

There is no indication here. And by all appearances, AIGFP has not made that determination, which means that there is still an obligation to pay those amounts.

THE COURT: All right. Attorney Kieran?

ATTY. KIERNAN: Yes, Your Honor. As Your Honor points out, the trilogy of Supreme Court decisions ends up with what the Appellate Court in the Johnson case that we cited, they still didn't do a three-part test for whether bonus or profit-sharing payments constitute wages.

And that three-part test, as set forth in Johnson, is that the award of compensation must be non-discretionary. That the amount of the

compensation must be non-discretionary. And that the amount of the bonus must be dependent on the employee's performance.

And significantly on that point of the employees' performance --

THE COURT: I'm going to ask you to raise your voice, Attorney Kiernan.

ATTY. KIERNAN: Sorry. Thank you, Your Honor. And that -- the comment about how the bonus must be dependent on the employee's performance, the case is in the trilogies I've made clear that, a bonus contingent on, or dependent on the performance of the enterprise as a whole does not satisfy the test for wages.

That's a profit sharing that doesn't fall into the wages test.

THE COURT: But under the Association Resources case, it was an upper management person who, the bonus was tied to the performance of his division; correct?

ATTY. KIERNAN: Yes, you're right, Your Honor. But there were two things about it, as you pointed out in your question. The first is that it was on the formula, so it was nondiscretionary. And the second was, the Court was at pains to say, it was based on the performance of his division which he was responsible for, not the performance of the entire

enterprise.

Had it been of the entire enterprise, the Court made clear in that decision, it would not have been -- it would have not qualified as a bonus.

So you take that, and then you look at the components of the payments that are in issue here. And if you look at the very first sentence of the deferred compensation plan, it says, under the existing arrangement with AIG, distributable income is paid each year on the basis of 70 percent to AIG, and 30 percent to AIG, the employees.

Under the plan, a portion of the distributable income, a portion -- 70 percent from AIG and 30 percent from AIG -- executives, will not be placed -- paid currently, but instead will be retained by AIGFP.

I'm reading from the paragraph at the bottom of the page on page two, Your Honor.

So it makes it pretty clear that, this is all about a profit sharing arrangement that is based on the overall performance of the enterprise, as to which the 30 percent of distributable income is then allocated.

Now there are a variety of exercises of discretion that take place here. If you look at the definition of distributable income. Distributable income --

THE COURT: And that's section 1.08 for the record; correct?

ATTY. KIERNAN: Correct, Your Honor, on page four. It says, shall mean with respect to any financial year of AIGFP, revenues less expenses, and credit, and market reserves taken for that year as the same shall be determined by the board from time to time.

So the first thing that happens is, determining distributable income, they -- the board of the company looks at profits and losses, and then decides on -- am I going to oppose or reserve -- impose or reserve on this? That's the first step to discretion.

THE COURT: Okay.

ATTY. KIERNAN: The second one is the one you identified in section 3.04, relating to additional return payments in which the complaint refers to, and is colloquially known as an equity kicker. And that's a point where the president, in his discretion each year, can take the portion of this 30 percent.

And it's expressly out of the 30 percent -- It says so in the -- in that provision -- and allocate it to planned participants. And allocates it on a pro rata basis. Now what does that pro rata basis mean?

It means, it isn't based on performance of the

individual. It's based on whatever percentage of the total plan balances your account represents. That percentage of the total amount of this additional payment gets allocated to you.

And so, it is both discretionary, and stated to be in the president's discretion. And also, based on the -- and not based on the performance of the individual, based on what the person's percentage participation of the plan is.

So that plainly, by the terms of the contract, is not a -- is not a -- doesn't satisfy either the -- what the requirement of non-discretionary -- or the requirement of being based on the performance of the individual.

With regard to the notional bonus, the notional bonus -- what happens is the notional bonus is established. And then, if you look at schedule A to the agreement, which is the very last page of the BCO, that determines how much of the notional bonus is paid immediately, and how much of it is deferred under this plan.

And you'll see, for example on schedule A that -- (Pause) -- that -- if Your Honor has it with me, it's schedule A, automatic deferrals.

THE COURT: So I'm looking for --

ATTY. KIERNAN: It's the very last page of the DCP.

THE COURT: Very last page of --

ATTY. KIERNAN: The Deferred Compensation Plan, which is exhibit A to the complaint.

THE COURT: No, I have that.

ATTY. KIERNAN: So it's the page that says, schedule A, automatic deferrals.

THE COURT: Yes. Mmhmm. Okay.

ATTY. KIERNAN: So you'll see that the notional bonus amount is set, and that notional bonus amount, plus the additional payment amounts to the 30 percent that is allocated to executives. And then the amount that his actually deferred under the plan is 10 percent of the first $500,000 of bonus, 20 percent of the next 250; 30 percent of the next 250, and so on.

So for example, if there's a $1 million of notional bonus that goes to the employees, 175,000 of it is deferred, and the rest of it is paid immediately.

Now, as to the argument -- so this is the amounts of the bonuses are discretionary. By the way, you'll also see, when you look at the SIP plan that it says that all bonus payments would be entirely at the company's discretion.

So these are discretionary bonuses. There is no allegation in the complaint that there may, pursuant to a formula. It is plain that the total amount of the bonuses, plus the additional payments is pegged

to the 30 percent of performance of the enterprise.

So it's not based on the performance of the individuals. It's based on the performance of the enterprise. And so, it doesn't satisfy the test.

Now, the plaintiffs have argued from there, well, even if it wasn't wages when it came in, it gets treated as wages now, because it's vested. There are two problems with that, Judge. One is, the payment of these funds into a deferred compensation account doesn't change the nature of the payments. The payments in their nature are not wages.

The second problem with it is that, they did not vest. What happened was that, they were credited to deferred compensation accounts. But it's in the absolute nature of deferred compensation plans that they are what the name implies.

The compensation; the actual earning of the amount, although the plaintiffs talk about this money as earned, and belonging to them already, the earning of the amount -- and by the way, the plaintiff's taxation for their payments, which is one of the things that employees like about deferred compensation plans, doesn't take place at the moment where the account's credited. It takes place at the time when the distribution is made some years later on.

And until that distribution is made, the

plaintiffs' entitlement, or the executives' entitlement to those balances that exist in an account in their name, is qualified by such conditions as the DCP applies to that entitlement.

And again, that's evident from the -- not only to the nature of the deferred compensation plans, but also by the statement that I read to you from page two which says, under the plan, a portion of the distributable income, a portion, 70 percent or 30 percent will not be paid currently, but instead will be retained by AIGFP.

Now this credits to accounts in the executives' names, but it is not owned by those executives, Judge. So for all those reasons, these payments are not wages under the three Supreme Court cases, and the decisions applying them thereafter.

THE COURT: Okay. Attorney Stamatopoulos?

ATTY. STAMATOPOULOS: Yes, Your Honor. I'd like to start, actually, by appointing Mr. Kiernan (Indiscernible).

THE COURT: I'm sorry. Your voice just dropped off.

ATTY. STAMATOPOULOS: I will move closer to the microphone, Your Honor. I apologize.

THE COURT: Okay. Thank you.

ATTY. STAMATOPOULOS: So I'd like to start by Mr. Kiernan's argument that the notional bonus

amounts were discretionary.

THE COURT: Mmhmm.

ATTY. STAMATOPOULOS: In fact, Your Honor, I'd like to turn your attention to the SIP that is in tab six, Your Honor.

(Pause)

ATTY. STAMATOPOULOS: In section three --

THE COURT: Attorney Kiernan, I'm going to ask you to mute your microphone.

ATTY. KIERNAN: I'm sorry, Your Honor.

THE COURT: I'm picking up your turning of pages, which I'm sure you all are picking up my turning of pages. So let me know if that's an issue.

ATTY. STAMATOPOULOS: Certainly, Your Honor. If you go to page two of the SIP, on section 201a Roman numeral one, you will see that it reads, in the third line it says, such executive's guaranteed bonus compensation. I'll start from there.

Essentially, what the SIP says is that certain executives had guaranteed notional bonus amounts. It's very clear that to the extent that an executive had a guaranteed notional bonus, there is nothing discretionary about the amount of that bonus. That bonus --

THE COURT: Were those the bonuses they were paid in 2008?

ATTY. STAMATOPOULOS: Your Honor, in 2008 when

the SIP was entered into, it was entered into because there was an understanding, due to the market conditions that, notional bonuses would be reduced. And that certain employees, whether they had their notional bonuses guaranteed or prescribed, pursuant to a formula, those would be reduced.

So the SIP as Mr. Kiernan pointed out, was an additional credit. And that credit, as Mr. Kiernan pointed out, was -- you know -- it was -- it had certain discretionary components. However, that doesn't end the inquiry.

THE COURT: But with this guaranteed bonus, was that paid out? Was that the bonus that was paid out?

ATTY. STAMATOPOULOS: There were cash amounts that were paid out, and then there were deferred amounts. And in fact, not to go back and forth too much, but if you go to the DCP, Deferred Compensation actually has no reference to distributable income.

That's in section 106 of the DCP. The DCP reads -- that is -- Your Honor, that is in tab five of your binder. Page three of that document. (Pause) And I'll just read it for the record. It says:

Deferred compensation shall mean with respect to each deferral as applied to each participant, the portion of the participant's notional bonus that is deferred by AIGFP pursuant to section three of this plan, including both amounts, subject to automatic

deferral and voluntary deferrals.

Now as Mr. Kiernan pointed out, schedule A contains the formula that you asked about that defines the deferral. But that's not where the section ends. It also talks about AIG's deferred compensation. And it says: As applied to AIG, the amount of annual distributable income of AIGFP, it would otherwise payable.

So it's very evident, Your Honor, from this section that defines deferred compensation, which is what we're talking about that, with respect to our clients here, deferred compensation was not tied to distributable income. And in the very next clause of the same definition, it was tied to deferred -- it was tied to distributable income only with respect to AIG.

So that --

THE COURT: But AIG had 70 percent; right?

ATTY. STAMATOPOULOS: AIG had 70 percent of the distributable income. Now there is also a 30 percent, Your Honor -- there's a 30 percent of that distributable income that goes to plaintiffs. But that's a separate portion of their deferred compensation.

I'd like to talk about that with your permission, Your Honor, for a second, and why that also is wages here. So as an initial matter, Your

Honor, to the extent that you find that, AIGFP doesn have an obligation to pay plaintiffs, then that constitutes a vesting, Your Honor.

It constitutes a vesting of that additional return payment. It's not just that it's credited nominally to plaintiffs' accounts. It's the -- this additional return payment actually constitutes a material inducement for their employment.

Not only an material inducement for their employment and the services that they provided, Your Honor, it's also material inducement for these individuals -- our clients here, to defer compensation that would otherwise be payable to the currently.

And Your Honor, this is well supported in cases that come after the trilogy of AIGFP. In fact, if Your Honor would turn to the Mercante (Phonetic) case, and I can point to you --

THE COURT: To which case?

ATTY. STAMATOPOULOS: One moment, Your Honor. Please bear with me.

THE COURT: Mmhmm.

ATTY. STAMATOPOULOS: So it's a case cited in AIGFP's brief. Mercante versus Collins, Your Honor.

THE COURT: What page on the brief?

ATTY. STAMATOPOULOS: That should be --

(Pause)

THE COURT: Oh, I see it on page 34.

ATTY. STAMATOPOULOS: That's correct, Your Honor. You --

THE COURT: That's a Superior Court decision.

ATTY. STAMATOPOULOS: That's right, Your Honor. But the Superior Court -- this Superior Court decision contains a discussion of the trilogy. And in that discussion on Mercante, it refers to vested stock options, and it actually contrasts vested stock options to unvested stock options.

And it says that, both -- it says that in a case that also came after Weins, the case that you mentioned earlier from December 2008 called, Randolph, that's in -- and I can point you to the precise -- but I'll make my point first, if that's okay with you.

THE COURT: Mmhmm.

ATTY. STAMATOPOULOS: In that Randolph case, the Court denied a motion to strike where the plaintiff was awarded vested stock options, which much likely, additional return payments here don't have a determined value at the time of vesting. You have to wait to exercise the options.

And they were offered from, as a material inducement, the plaintiff to the employee, so that the employee would agree to work for a reduced, nominal -- or rather I should say, for reduced -- for

a reduced salary, as compared to his current salary.

This is very similar to this case, Your Honor. What's happened here -- and I'll separate the DCP and the SIP for you. With respect to the DCP, the additional return payment was a material inducement so that our clients here would accept to participate in this deferred compensation plan, whereby they would defer payment of amounts that would be payable to them currently, and with respect to the SIP which was entered into. And I'll pause if you want to ask a question, Your Honor.

THE COURT: Well the question I have in Mercante is the stock options that were given to the employee had the time passed when the stock options that were given to the employee had the time passed when the stock options and vesting were payable.

ATTY. STAMATOPOULOS: I apologize, Your Honor. Could you repeat your question?

THE COURT: Yes, the Mercante case where you're talking about the stock options that were given. Had they -- Are they vested and were they payable at the time the case was brought?

ATTY. STAMATOPOULOS: The -- Actually, Mercante refers to the Randolph case. That's the case that refers to the stock options. But yes. Yes, that's correct. And the employer refused to allow the employee to exercise the stock options. I'll just --

umm --

THE COURT: So they had a value as of the date where their employer was refusing to allow the employee to exercise the stock options?

ATTY. STAMATOPOULOS: That is correct, Your Honor. But here, this case is -- for lack of better words, the deferred compensation here satisfies the criterion for wages even more so than the vested stock options, in the sense that we have a definite amount.

You don't need to wait to see how much the options are going to be worth at the time the employee is going to try to exercise the options. It's a specific amount. It's a specific amount we're claiming.

THE COURT: Well, it depends on the value, doesn't it -- of the stock at the time of exercising the option? I mean, it could vary wildly, depending on when they get it to when they exercise.

ATTY. STAMATOPOULOS: With respect to the options, you're absolutely right. What I'm saying, Your Honor, however is that the additional return payments here, unlike the options, you don't even need to wait for the value to occur, for the time to -- you know -- for the expiration or for the time that you can exercise.

It's a specific amount. But it is analogous to

the options in the sense that it is a material inducement to accept some discount of the actual salary -- of the non-discretionary, if you will, on that (Indiscernible).

I mean -- I can go on with additional reasons, Your Honor, but I suspect you might have questions. I'd be happy to address those.

THE COURT: Well, I'd like to hear from Attorney Kiernan in response to what you just argued.

ATTY. KIERNAN: So two points, Your Honor. First if I could start with the S-I-P. Counsel brought -- drew it to your attention. It's the next exhibit after the D --

THE COURT: No, I have it.

ATTY. KIERNAN: -- the DCP. If you look at section 2.01 of the SIP, after the A -- the last paragraph -- sub-paragraph of A. For the avoidance of doubt, etcetera, etcetera, the awards to such executive of any 2007 SIP credits shall be in AIGFP's discretion, as stated in 3.01a. 3.01a, a 2007 SIP credit for each covered executive shall be determined by AIGFP, in its absolute discretion.

I don't know how there could be a more unambiguous indication that these are discretionary payments.

With regard to the DCP -- (Pause) -- it's clear in the language that I reported to you from the

preamp, Your Honor, and it's clear throughout the DCP that the sum of the notional bonus amounts, plus the additional payment amounts, plus by the way, interest on the -- the amounts that are in the plan.

It's supposed to add up to the 30 percent of distributable income that is allocated to plaintiffs. What that means is that these funds are -- since they're pegged to -- the notional bonuses are pegged to, in combination with the other pieces, to the 30 percent of income of the entire enterprise.

These funds are not pegged to the performance of the individual executive. And this is something -- you know -- this is a fact pleading jurisdiction, Your Honor.

The plaintiffs have not alleged that they were paid pursuant to a formula, as to which the dollar amount of the -- of the bonus they would receive was fixed in advance, or in which it was based on a formula that was directly tied to their performance, or as you say in the case of the association enterprises, directly linked exclusively to the performance of a group of people for whom they were responsible to.

It's not alleged. There's no reason to assume it. And it's plain that it's keyed ultimately to the performance of the entire enterprise.

THE COURT: Thank you. Anything further before

we move on?

ATTY. STAMATOPOULOS: Certainly, Your Honor. If I may, I'd like to address a couple points that Mr. Kiernan made. First of all -- First of all, Your Honor, Mr. Kiernan said that the notional bonus is pegged to the distributable income.

I'd like to direct Your Honor's attention to section 112 of the DCP, that's the definition of the notional bonus.

THE COURT: That's 1.12?

ATTY. STAMATOPOULOS: That's 1.12. That's correct.

THE COURT: Okay.

ATTY. STAMATOPOULOS: I won't tire you by reading what it says, but you will see, Your Honor, that there's nothing in that definitional section that ties the notional bonus to the distributable income.

Secondly, Your Honor --

(Pause)

THE COURT: Okay. Thank you.

ATTY. STAMATOPOULOS: That's one. Secondly, Your Honor, Mr. Kiernan said that we have not alleged that the amounts were calculated -- oh, the second thing that I want to say about the notional bonus, Your Honor, it's already clear from the SIP that certain notional bonuses were guaranteed.

To the extent that these notional bonuses were guaranteed, even if AIGFP had zero distributable income, they would still have a contractual obligation to pay them -- to pay these bonuses. So the notion that the notional bonus is somehow pegged to distributable income is just plain false, Your Honor.

If you have a guaranteed bonus, the company doesn't need to have profits of distributable income. You're still entitled to that bonus. And that is also reflected in the definitional section that I just mentioned, 112. There's no tie to distributable income.

Secondly, Your Honor, with respect to the --

THE COURT: Quick question there. At the time that the bonuses were paid to executives of the financial group under the ERP, were these guarantee bonuses the ones that were reflected under the ERP, or are these separate guarantee bonuses?

ATTY. STAMATOPOULOS: I believe Your Honor means the DCP? Not the --

THE COURT: No. There's a --

ATTY. STAMATOPOULOS: The DRP.

THE COURT: I believe it's the ERP. There were bonuses that were paid out from the financial stimulus that was provided by the Federal Government. And the $85 billion that AIG got, they gave $65

billion to AIG Financial Group.

But there were bonuses that were paid to executives at that time. What agreement were the -- and the position AIG took was, they had no choice. Those were guaranteed bonuses. They were obligated contractually to pay them. Those were not the notional bonuses. That was something entirely separate?

ATTY. STAMATOPOULOS: That is correct, Your Honor. That was -- That is absolutely correct. The notional bonus has two components. One is that it's paid out in cash, currently. And that's in the definition.

And then it has a deferred amount that goes into the DCP. The ERP is a separate plan altogether. If that's satisfactory, Your Honor, I'd like to --

THE COURT: It is. Okay.

ATTY. STAMATOPOULOS: I'd also like to address the point that Mr. Kiernan made; that the SIP credits were entirely within AIGFP's discretion. It may well be the case that prior to crediting, these were in AIGFP's discretion to the extent that it was able to show profits; to the extent that it was able to generate these credits.

However, Your Honor, these SIP credits, much like the amounts in the DCP, the obligation to pay and to restore account balances is not governed by

the section that Mr. Kiernan pointed to, which is participation.

They're actually governed, Your Honor, by a different section. In the SIP, if you turn to page five, the one that says, AIGFP's liability. And then on page six -- (Pause)

THE COURT: Go ahead.

ATTY. STAMATOPOULOS: On page six under subsection B, you'll see, Your Honor, that it says that -- I'm going to -- it says it's -- close to the middle of that section it says, AIGFP shall be obligated subsequently to restore amounts so deductive from covered executives in AIG's account balances. And it goes on.

The bottom line is, Your Honor, that section 401b is what governs AIGFP's obligation to pay plaintiffs these amounts, once the amounts are credited. This is really the section that makes the amounts non-discretionary.

And I would also like to call Your Honor's attention to one more issue here. There are three -- there are essentially three different types of buckers from which this comp -- deferred compensation was sort of like, accumulated.

One is the notional bonuses. We've already discussed how these are completely untethered to distributable income. So that should, from our

perspective, end the inquiry with respect to notional bonuses.

Then there is the additional return payment. The additional return payment entails discretion with respect to the determination of the amount. But once the amount is credited, first of all, it's non-discretionary whether to pay it out or not. And secondly, Your Honor, the amount is much like stock options, vested stock options. It's a material inducement. And therefore, it constitutes wages.

The same exact calculous, Your Honor, that applies to the additional return payment also applies to the SIP credit. It's discretionary when you award it, but once you've awarded it, it's now a material inducement to retain these employees.

And lastly, Your Honor, I'll just say this, that it's alleged in the complaint, and it's also in the DCP that, one of the core purposes of the DCP was to attract the best and the brightest -- the most talented people and retain them.

And the SIP acknowledges that, as a result of the financial crisis, and the fact that employee compensation had been reduced due to AIGFP's core performance, the SIP was instituted to continue to retain these people, our clients, who helped the company exit the crisis.

So it's very clear, Your Honor, that this was

tied to two individual performance.

THE COURT: Thank you. Anything further, Attorney Kiernan, on this issue?

ATTY. KIERNAN: Your Honor, I'd just like to, if I could, answer or clarify a question that you asked, by reference to the ERP. So the ERP is the next exhibit after the SIP in the package of the exhibits to the complaint.

And you asked whether the amounts that got paid out were amounts pursuant to the ERP, and let me just show you how that -- how that went down. (Pause) Umm -- Now, as we talked about, Your Honor, in any year, discretionary income would be determined and -- sorry -- distributable income would be determined. And a bunch of it would be distributed immediately -- paid out immediately. And the rest would be retained under section A.

Of course, in the meltdown of 2008, there was no distributable income. And so, there was nothing paid out of the DCP. And also the SIP recites that its purpose is to create an opportunity for greater profits -- for greater sharing because the DCP wasn't doing it's job, essentially, because as the SIP explains in its preamble. Some marked -- market adjustments have caused there to be no additional return payments, and it's significantly reduced the amounts available for the -- for bonuses, generally,

in the prior year.

The SIP tried to cover it, but again, the SIP also had no -- nothing to distribute, because even as adjusted, there was no net income -- because these plans were all drafted before the meltdown of September of 2008.

Now the ERP came along because the SIP wasn't going to work, and they still needed to retain their employees. So what they did in the key provision of the ERP that differentiates it from the others is 3.02a.

THE COURT: Okay.

ATTY. KIERNAN: So the 3.02a -- I'm sorry. It's going to -- I'm taking you through two steps. I'm sorry. Start with 3.02a. 3.02a says; under the existing arrangement between AIG and AIGFP and its employees, distributable income of FP is payable each year, 70 percent to 30 percent as bonuses.

The bonus pool will continue to equal 30 percent of distributable income. So if you had any doubt about whether the total amount of all the bonuses paid was supposed to equal 30 percent of distributable income under the existing arrangements, here's contractual confirmation that it was.

But here -- The 3.01a is actual the pivotal provision. 3.01a says; subject to sections -- for the 2008 and 2009 compensation here, each covered

person shall be -- other than senior management, shall be awarded a guaranteed retention award, equal to 100 percent of such covered person's 2007 total economic award.

And B says, Senior Manager's is equal to 75 percent of the total economic award. But what that means on the BERP is that, even in a year with no distributable income, these employees have a contractual entitlement to either 100 percent or 70 percent of their total economic awards from 2007.

So that's the amount that is owed, even if there's no income at all. Even if there's a wipe out, when AIG is talking about, we are contractually bound to pay these amounts, or AIG will say, our hands were tied. These were the obligations.

Now they didn't pay out all of it. If you look at section 201b --

THE COURT: Did you say, 201b?

ATTY. KIERNAN: Yes. You'll see that each person who's -- 2008 or 2009 total award is exist -- is excessive, the level referred to in schedule A of the deferred compensation plan shall be required to defer.

So those payments were still subject to deferral, but that still meant that out of the first -- for example, million dollars of guaranteed retention amounts, all but 175,000 of it will be paid

immediately was due immediately to employees, even if there was no distributable income, and therefore, no bonus pool to operate from that year.

So I hope that answers --

THE COURT: That does. Thank you.

ATTY. STAMATOPOULOS: Your Honor, if I may, I have a couple points to make, as to Mr. Kiernan's clarifications. First of all, with respect to section 302a of the ERP, which says that, there's a bonus pool, that bonus pool doesn't refer to the (Indiscernible)

THE COURT: I'm sorry. Attorney Kiernan, can you please take your microphone down? I just heard your papers over --

ATTY. KIERNAN: I apologize again, Your Honor.

THE COURT: That's okay. If you could just repeat that, Attorney Stamatopoulos?

ATTY. STAMATOPOULOS: Certainly, Your Honor. So if you go to section 302a, Mr. Kiernan said, or argued that the bonus pool amounts to the 70 and the 30 percent, collectively. So the 70 -- with the hundred percent make up the bonus pool.

But Your Honor, the bonus pool is not tied anywhere in the ERP to the notional bonus amount. That is particular and defined --

THE COURT: Right. No, I understand that.

ATTY. STAMATOPOULOS: So this now made clear and

specific to the ERP. It doesn't have anything to do with the notional bonus.

THE COURT: I understand that.

ATTY. STAMATOPOULOS: Further with the -- with respect to the total economic award, Your Honor, if you go to section 129 of the ERP it says; total economic award for 2007 shall mean for each covered person -- mind you, not all plaintiffs here are covered persons. Only a subset of our clients here are covered persons.

It is the sum -- and it goes on.

THE COURT: Can I have that section number again?

ATTY. STAMATOPOULOS: 1.29 on page four of the --

THE COURT: Got it. Thank you.

ATTY. STAMATOPOULOS: As an initial matter, the total economic award is only relevant to covered persons. Not all of our clients here are covered persons. Some are not covered persons.

Secondly Your Honor, it says very clearly here that, this amount is determined before taking into account any deferrals of such compensation or contributions or amounts to the deferred compensation plan.

So the ERP is really irrelevant -- I mean -- it's irrelevant. It's not how we determine --

THE COURT: No, I understand that. I think he clarified it because of the Court's question on the bonuses relate -- under the ERP. And Attorney Kiernan did clarify that for me, because my question was whether the guaranteed bonuses referred to in the SIP were the same guaranteed bonuses were paid out under the ERP. And they're not.

ATTY. STAMATOPOULOS: I apologize for offering that additional unnecessary explanation, Your Honor.

THE COURT: No problem. All right. Moving on to count one of the complaint and the motion to strike.

(Pause)

THE COURT: Attorney Kiernan?

(Pause)

THE COURT: You just need to unmute your microphone, please. Sorry.

ATTY. KIERNAN: Thank you, Your Honor. I seem to have it on when it should be off, and off when it should be on.

THE COURT: (Chuckle)

ATTY. KIERNAN: And happy to proceed, and again, if you have any questions, I'm happy just to start with the questions, or I'll launch right in.

THE COURT: No. Why don't you proceed? I've read through all the briefs. Go ahead.

ATTY. KIERNAN: Okay. Well, thank you.

Obviously, Your Honor is very up to speed on the briefs. And let me just say as an overview that, this is really kind of a remarkable claim, Your Honor.

I mean, there's no dispute that AIG executives profit sharing deferred compensation balances, which represented only a portion of what they were compensated for the relevant years that was set aside under that schedule A that we looked at, were entirely reduced to zero in 2008 after the truly extraordinary losses that -- of historic significance that reduced -- properly reduced their fund balances to zero, and left AIGFP in a ruined and wined down position, unable thereafter, to make any profits.

And continuing to exist, only with the support of a loan from AIG, that it's never going to repay.

And more than a decade after that appropriate illumination of fund balances that is not contested as an appropriate reduction of fund balances, a subset of former AIGFP employees, plainly inspired by legally incorrect, and subsequently reversed decision by an English trial court, came to this court with the remarkable proposition that, this profit sharing plan should be interpreted as operating, so that they are entitled to full restoration of all of their prior existing balances, as though nothing had ever happened to this entity, as to which extraordinary

things happened.

And that they should be entitled to a share of profits that don't exist from the past, and profits that will never come again. And that al this should be paid for, if necessary, because AIGFP couldn't, but -- just having AIG do it, even though the plan is so strongly built around the notion of pro rata sharing between AIG and 70 percent as owner, and 30 percent going to executives.

And that DCP so plainly contemplated to have the purpose that AIG executives -- FP executives and AIG would share risks pro rata. And that doesn't make any sense, Judge.

THE COURT: Isn't the real question here, is not that there were losses in 2008, 9, 10, 11, 12. The question really is that, at some point the company became somewhat profitable, and that the time period to restore those balances should have extended past December 2013.

That's what the plaintiffs seem to be arguing. And that there would have been an opportunity there to restore those balances, and that there was an obligation on the part of AIG Financial to restore those balances.

And then the argument of AIG Financial is, no, we had a drop-dead date of December 2013. If we couldn't do it by then, we were done.

ATTY. KIERNAN: Your Honor, there's no allegation in the complaint that AIGFP ever became profitable again, ever had any chance of getting profitable again, or ever will be profitable again.

The allegation is that, AIG, the parent, became profitable. AIG, the parent, was able to survive, because it had this financial products disaster, and then it owned the world's largest insurance companies.

And it had important valuable assets in those insurance companies that enabled it to survive, pay back the loan from the government, and become thereafter, profitable. Entirely, the allegations are at the parent level.

There is no allegation, nor could there be that, there has ever been any profit in AIGFP at any time since 2008. It is our contention that the obligation to restore lapsed in 2008, but it's also -- plaintiff's don't allege, and they can't allege that there's ever been any profit every -- any year after 2013, just as there was no profit in any year from 2008 to 2013.

This is an empty shell of a company, and --

THE COURT: Let me ask Attorney Perlstein this question on -- with respect to this issue. Are the plaintiffs alleging anywhere that AIG Financial became profitable?

ATTY. PERLSTEIN: Your Honor, I think that would be an issue for discovery. What I think is clear though is what AIG is trying to do is take advantage of it's own winddown.

So AIG -- first, we disagree with the notion that there's a condition of profitability or distributable income. And I'm happy to address that. But even assuming that there was a condition on profitability, what AIG then says is that, well, we're never profitable. We shifted all the business out of AIGFP. We moved it all to AIG. We voluntarily wound down the company. And therefore, we can't make any profits.

But under Connecticut law, that's just not how -- it's not how it works. If a party -- if there's a condition in a contract, then the party has an obligation to try to fulfill that condition. In addition, a party can't take advantage of it's own action or inaction, in saying the condition didn't happen.

So here -- and we cite the Cole (Sounds like) case for the factors, and this is on page 27 of our brief. But there are four factors that we -- to look at the -- take advantage of their own -- of the situation -- (Indiscernible).

First you need to see if the event or the non-occurrence of the event made the performance

impracticable. Second, you would need to take a look to see, does the non-occurrence of the event, was it a basic assumption of the contract?

Third, Your Honor would need to look to see whether the impractability (As said) resulted without the fault of the parties seeking to be excused. And then fourth, the party has not assumed a greater obligation than the law imposes.

So we think it's pretty clear under Connecticut law that, AIG couldn't escape it's own contractual obligation by using the wind down, which was its own decision to make to satisfy -- to say that they don't have to satisfy the condition.

If you go through those four factors, first, whether or not the non-condition even makes it impracticable, as Mr. Kiernan said, and it's in their briefing -- and again, this is outside the proper scope of a motion to strike, because this is outside of the complaint.

But even if you look at Mr. Kiernan's brief on this, it says that AIGFP is using a credit facility to repay every other creditor, except for our clients.

So it's not even clear that this condition that exists or didn't exist actually makes performance impracticable. That's point one.

On point two, AIGFP's lack of profits was not a

basic assumption of the contract. In fact, we would say it's entirely foreseeable that AIGFP would not have profits, and AIG would still owe the amounts. And for that, Your Honor, we return to, and focus Your Honor's attention on the bankruptcy provision, DCP.

That is, Your Honor, on page 16 of the DCP. And it's about two-thirds of the way down the page. And it starts -- (Indiscernible).

THE COURT: Okay.

ATTY. PERLSTEIN: So the bankruptcy provision says, notwithstanding the terms of any such plan in a bankruptcy, AIGFP -- oh, I'm sorry -- In a bankruptcy or insolvency of AIGFP, each participant and participant's beneficiary and AIG shall have an unsecured claim subordinated and junior in payment.

And then it goes on, but it says for -- you know -- by which the balance is credited to deferred compensation accounts were reduced, and not subsequently restored.

So even in the case of a bankruptcy, the DCP contemplates that our clients, the employee of AIGFP, would have a claim in a bankruptcy for the full amount of their DCP accounts. Not just the restored amounts, the full amounts, even the unrestored amounts.

So as to the question, was profits a basic

assumption of the contract for them to perform, we think the bankruptcy provision makes pretty clear that it wasn't. Moving to the third element --

THE COURT: Whoa, whoa. I want -- if I can, Attorney Kiernan, could you address the bankruptcy issue?

ATTY. KIERNAN: Sure, Your Honor. The bankruptcy provision is actually a pretty extraordinary provision, which tends to reinforce the level of risk that attached to the executives entitlement to the payment of the funds in the DCP account.

Because it doesn't just say --

THE COURT: I just need you to raise your voice, please.

ATTY. KIERNAN: Sorry. The provision doesn't just say, well -- umm -- executives will be entitled to payment of deferred amounts, subject obviously, the risk that if AIGFP goes bankrupt they'll be left with whatever they have in the bankruptcy.

It's much more stringent than that. What it says, and Mr. Perlstein quoted some of the language is, that these executives, in the context of a bankruptcy would be absolutely last in line to recover anything.

THE COURT: But they're still in line, as a non-secured creditor.

ATTY. KIERNAN: Yes, but -- unsecured, junior, and subordinate, but with extensive discussion in 4.01a about all the steps that have to be undertaken to make sure that no payment is made to any executive until all other payment obligations are satisfied.

And that includes, in this case, by the way, the multi-deck of billion-dollar payment obligations to their parent, AIG. They have no entitled to a payment of anything. By putting them in -- last in line, they relegated them to an extremely limited status, as to which -- which placed significant risk on their ability to recover anything.

THE COURT: But they --

(Cross-talk)

THE COURT: Right, Attorney Kiernan? I mean -- right. I mean they would stand the risk that there might not be assets in order to pay out the claim, but they would have a claim.

ATTY. KIERNAN: Correct. So the giveth and the taketh away in the bankruptcy provision is that, if the company goes bankrupt, we won't say that your claims are non-existent. We'll just put them absolutely last, but in a context where absolutely last here would mean, you get nothing because of the AIG debt that stands in front of you.

And you know -- one of the things the English Court of Appeals said in it's opinion at section --

at paragraph 92 is, when you see such an extraordinarily subordinated status in a bankruptcy, that tells you something about the subordinated stature of the claims outside the bankruptcy as well.

So that's my comment on the bankruptcy piece. On the question -- I'm not sure you've gotten the answer to the question you asked Mr. Perlstein. The question was, does AIGFP allege -- I'm sorry. Do plaintiffs allege that AIGFP ever had profits in any year after 2008?

I think the reason he didn't answer your question is because the answer to that question is no. And he was talking about pleading obligations for -- he actually said, that's a subject for discovery.

Your Honor, if that's a predicate for recovery, it's a subject for pleading. And it is not pleaded. In fact, instead what they do is they attach to their complaint the now discredited lower court decision, which has a chart on paragraph 111 of all of the company's distributable income results from 2008 through 2016. And you'll see that they are extravagantly negative every year.

This is a company that is to which plaintiffs who were around, many of whom were around for a while after the 2008 meltdown know that AIGFP is not going to make any money, and never did make money.

THE COURT: Well, this leads me into the next question of you, Attorney Kiernan is that, the argument that are being made by the plaintiffs is that your motion to strike is limited to the allegations of the complaint.

And the issues that you are raising are issues that cannot be addressed in a motion to strike, and the discovery would be needed. And it may be more appropriately decide on motion for summary judgment or a trial. And what's your response to that?

ATTY. KIERNAN: That's I think, one of the pivotal questions, and I'm glad I have an opportunity to address, Your Honor. This is a place where the English Court of Appeal was right. There is a straightforward --

THE COURT: Yes, but I need you to focus on Connecticut law. And the Connecticut law that I'm focused on is that, I'm limited to the allegations in the complaint to determine whether they have A) sufficiently alleged the claims that they have alleged, and whether as a matter of law the contract should be enforced.

ATTY. KIERNAN: Correct, Your Honor. Obviously, the allegations in the complaint and the things that the complaint does not allege. So what we assert is there's a straightforward legal issue of contractual interpretation, readily determinable on a motion to

strike, which is, when balances have been reduced, is the obligation to restore contingent on the presence of profitability, distributable income, debt profits in some year after the year where the balances are restored.

We say that the answer is that, it is contingent on the existence of some profitability the year after the balances were reduced. And that the restoration obligation doesn't exist as a matter of law, and contractual interpretation without those balances. And we say the plaintiff -- the complaint does not end, by the way. It cannot.

And to the sense that it incorporates the English Trial Court opinion creates the contrary that AIGFP ever had any such profits in any years before the provision -- before the restoration obligation latched in 2013. And even if it didn't latch in any year thereafter.

So the combination of the legal principle, the interpretive principle, whether the right to restoration exists, absent the distributable income, to the legal question, contract interpretation, ready material for the motion to strike, and the absence of an allegation of any profits, which we say is the factual predicate to any title to the restoration. It makes this an appropriate issue for resolution on a motion to strike.

THE COURT: Okay. Thank you. Attorney Perlstein?

ATTY. PERLSTEIN: Thank you, Your Honor. Your Honor, I think the fundamental issue you're grappling with that, on a motion to strike, what we're looking at is our interpretation of the contract reasonable. And then, if the language of the contract is susceptible to two or more reasonable interpretations, then it's ambiguous, and then you're into fact discovery.

And Your Honor, I think in looking at AIG's cases, it's actually pretty hard to find cases granting a motion to strike on a breech of contract claim. In fact, AIG, most of the cases it cites in that section of its brief are either summary judgment decisions, or after -- after decisions at trial.

And in fact, it cites the DTI case on page 18 of its brief. And in citing the DTI case -- and I can let Your Honor get there, it doesn't -- it doesn't say anything (Indiscernible)

THE COURT: Sorry. Attorney Kiernan, I'm going to ask you if you could please mute your microphone again?

ATTY. KIERNAN: My apologies, Your Honor. Thank you.

THE COURT: Thank you. Attorney Perlstein, you said page 18 of the defendant's brief?

ATTY. PERLSTEIN: Yes, the DTI case.

THE COURT: Mmhmm.

ATTY. PERLSTEIN: And it cites it saying, interpreting agreement and granting motion to strike. But when Your Honor actually looks at the DTI case, the motion to strike was on counts two through four of defendant's counterclaim, which alleged violations of the Connecticut Unfair Trade Practices Act.

But the breech of contract claim was in count one, and not the subject of the motion to strike. Here, we obviously are not asserting a breech of the Unfair Practices Act, but we do assert a breech of contract.

So I think what you -- the issue Your Honor is really grappling with is, is this proper on a motion to strike? And we think these are -- our -- and I can walk through this with Your Honor. I can do it now, or sort of in my time.

But we think that for various reasons, our reading of the agreement is completely --

THE COURT: They also cite too, The Association Resources versus Wall case.

ATTY. PERLSTEIN: Yes. The Association -- I believe -- umm -- let me just take a look at that one.

(Pause)

ATTY. PERLSTEIN: I'm not saying there are no

cases. I'm just -- I don't remember. The one that I have --

THE COURT: Well, that's a Supreme Court case.

ATTY. PERLSTEIN: Right. They did cite to the Honolla (Sounds like) case also, which that was on a motion to strike. But that case was -- well actually, no. That case was -- the Honolla case was also as an appeal from a judgment of the Trial Court.

So there are -- It's not to say there aren't cases out there. But it's very hard. And one of the cases that AIG cites, where it was a motion to strike, there was a provision in the contract that said -- oh and -- this is the AC Consulting case.

The motion to strike, the contract claim was granted because the plaintiff said there were two paragraphs that could not be reconciled. The first said, the contract is effective until 2016, unless it's terminated early in accordance with paragraph seven.

Paragraph seven said that it can terminate in five days' notice. The plaintiff there said, that's irreconcilable. And the Court said, with all due respect, no it's not.

THE COURT: Just a quick question. I'm looking at the Association Resources case, and it looks like it was appealed after trial.

ATTY. PERLSTEIN: That may be the case also.

Let me just take a look at that. One moment. Association Resources v. Wall. Yes, that was -- there was a bench trial in that case. Following dismissal of corporation's claims and after a bench trial, entered judgment in favor of officer awarding the bonuses and statutory penalties corporation appeal.

So that case itself was also after a bench trial. So really, it's pretty hard to find these cases, and hear -- and I think under our circumstances, we think we've shown our reading of the contract is more than reasonable.

So the first issue we would look at to see, is there an express condition on performance? And clearly, looking at the restoration provision, there was no -- there's no express condition on the restoration provision.

Your Honor, this is at section 4.01b, also on page 16.

(Pause)

THE COURT: Just a second. (Pause) Okay.

ATTY. PERLSTEIN: So the restoration provision says, AIG Financial Products shall be obligated to subsequently restore amounts so deducted from participant and AIG account balances, plus accrued interest thereon, at an interest rate determined in appointed section 3.03.

It says, the board shall adopt a plan setting forth a schedule under which AIGFP shall restore amounts deducted. So it uses typical mandatory language. And it doesn't use that language once. It uses it three times. AIGFP shall be obligated to subsequently restore. The board shall adopt a plan.

AIG Financial Products shall restore amounts so deducted. AIG was clearly a sophisticated party. If it wanted to condition the restoration of --

THE COURT: Wait. And going back to 401b, it ways, yes, it shall restore. But there's also language in there which I believe, the defendants rely on that, to the extent amounts have not been restored by December 31st, 2013, all restoration rights shall permanently lapse, except to the extent AIG Financial Products Group determines it may amend the plan to provide for the payment of restored amounts. Right?

ATTY. PERLSTEIN: Absolutely. The lapse provision we think is an important part of Your Honor's consideration. And AIG reads the lapse provision to mean that, if by December 31st 2013 they haven't restored, they're just done. And then they focus on the may amend language to say, if we wanted to amend, it was completely in our discretion.

But first of all, we don't even think that's a reasonable reading of what that provision says. But

even if Your Honor wanted to credit AIG's reading, we think our reading is perfectly reasonable as well. What we say is that, they had an obligation to pay by December 31st, 2013.

And then they had an obligation to extend that date, unless one thing. If they made a determination that it would violate section 409a, then they were relieved of the obligation to extend.

But other than that, they had an obligation to extend. And instead of actually extending -- and we plead this -- they sent a letter to my clients and other DCP participants in July 2014, saying, we're done. We're finished. We didn't pay you by December 31st, 2013. Balances are negative, and you're never going to see this money.

And again, coming back to the point that you asked Mr. Kiernan about, which he said that I didn't address, they do this on the basis that they have no profits, because they voluntarily wound down.

And my point is, even assuming Mr. Kiernan is right that there are no profits, and again, it is outside of the motion to strike. But even assuming that Mr. Kiernan is right, it wouldn't matter, because the reason why they have no profits, is because they voluntarily wound down.

Because of that they can't take advantage of their own breech. That's just Connecticut law.

Those are the four factors I was talking about. And the one factor that I hadn't addressed, the third factor, is this something that the person taking advantage of the condition caused?

And here -- I mean -- at this point it's practically an undisputed fact. They say they voluntarily wound down. So AIG, under our reading of the agreement, had an unequivocal obligation to either restore the amounts, or come up with a plan.

Now, that plan could have been anything. It could have been getting back to work. It could have been selling assets. I don't hear Mr. Kiernan saying, there are no assets at the company. And not again, this is a subject for discovery.

But I understand, they have buildings. There are assets at the company. And even in a bankruptcy where Mr. Kiernan is saying, we are subordinated and junior, and come last. Where AIG is guaranteeing every other obligation of AIGFP, our clients may actually do pretty well in a bankruptcy, even if they don't get the benefit of that guarantee, they get all the other assets of the company.

But the point is, AIG --

THE COURT: If there are -- If there are any assets.

ATTY. PERLSTEIN: If -- Right. If there are assets. But that's a subject for discovery. And

then, if there aren't any assets, we need to look to seize, did AIGFP cause that? Right? Did AIG, for example, have all of the employees and business, and business opportunities of the company just funneled from AIGFP to AIG?

A bankruptcy receiver, or a bankruptcy trustee -- you know -- might -- look at preference actions. They might look at fraudulent transfer actions. There might be a lot of things that went from AIG -- from AIGFP to AIG that are going to get clawed back into a bankruptcy estate.

But the point is AIGFP --

THE COURT: But there is no bankruptcy.

ATTY. PERLSTEIN: That's the point I was coming to. There is no bankruptcy, and because there is no bankruptcy AIG either had to restore account balances, or they had to come up with a plan to do so. And they just walked away from that obligation. And that's why we brought this lawsuit.

Our clients are the clients -- you know -- notwithstanding the innuendo in their brief, our clients are not the people that caused the financial meltdown. I know that's an issue of discovery that maybe we'll get into one day. But our people are the people that stayed at AIG during the financial crisis, and after the financial crisis to help it return the $85 million it paid to the Federal

government, plus another 20 billion.

That's the other thing --

THE COURT: But it's not disputed, is it, that the catastrophic losses that AIG was facing were based in large part from the financial dealings from AIG Financial…

ATTY. PERLSTEIN: Oh no, no. I don't think that's in dispute. But I believe there was some suggestion in the briefing that it was sort of the plaintiff's in front of Your Honor now that had some sort of personal culpability in that.

And our point is, that just simply -- it's 1) legally irrelevant, I know. But -- you know -- this lawsuit is personal for a lot of people, and that -- people bristled at that. And these are not the people that were the cause.

These are the people that actually stayed at the company to make sure it could survive this time. And they did that in exchange for certain promises that AIG made in these agreements that then, after they stayed, they were told money that they already had earned, money that they couldn't have been paid out immediately, but instead that they both a) were required to defer, and then also could voluntarily defer more, that they were no longer getting those amounts.

And not only was AIG not putting -- not

restoring them, they weren't even going to try to put a plan in place to do so. That's not a reasonable reading of the agreement. That's a) I think a breach of the agreement, and as we could address as well, even it would be breech of the good faith and fair dealing, if they actually had an obligation to put a plan in place, and then just abuse their discretion in not putting a plan in place. That would be a basis of our good-faith claim as well.

So I'm happy to -- I have other things to say, of course.

THE COURT: Okay. Well, I'd like to hear Attorney Kiernan's response to.

ATTY. PERLSTEIN: Yes.

ATTY. KIERNAN: Sure, Your Honor. That was a little bit wide ranging. I think that the piece that we were addressing was the question whether that this is an appropriate issue to be addressing on a motion to strike.

And on that, I think there are a couple of propositions that are not contested propositions of Connecticut law. The first is that -- is that, a Court's first effort in trying to interpret a contract is to see whether looking at the contract -- looking both at the specific provisions at issue, and then the contract in its entirety in attempt to have it -- an understanding of the contract that is

coherent and consistent throughout the contract.

That the Court is to look and determine whether it can understand an interpretation of the contract without the need for extrinsic evidence. And if it can do so, then that interpretation of the contract is a question of law.

And that's what we submit can be done here and should be done here. And that when it can be interpretation of the contract can be resolved as a matter of law, then that can be an appropriate subject for a motion to strike.

And so, what we're saying is, that there is an -- the correct interpretation of this contract is one that says that, the obligation to restore requires that -- as -- by the straightforward application of the contract language, read in light of the statements of contractual purposes, the obligation to restore doesn't exist in the absence of distributable income.

And I certainly hope to get an opportunity, Your Honor, to take you through the argument on that, because that's our core argument. Now, another thing -- prime principle of Connecticut law that I think is undisputed is --

THE COURT: Can you speak up, please, Attorney Kiernan?

ATTY. KIERNAN: Sorry?

THE COURT: Can you please speak up? Thank you.

ATTY. KIERNAN: Oh, I'm sorry. I'm fading here, and I apologize.

THE COURT: Yes. Mmhmm.

ATTY. KIERNAN: Another proposition with a -- that I think, it is not a disputed proposition in Connecticut law is that, the fact that the parties disagree over the interpretation of the contract does not mean that there is an issue of fact that needs to be resolved.

That's why we have you, Judge. We know we disagree about it. But we recognize that the Court can interpret contracts, the ways that resolve the disputes about the contract. If our reading of the contract is the correct one, it could be discerned from the contract itself, that again, looking at the specific language and the general contract language that taken together, then the appropriate thing to do is to grant the motion to strike.

THE COURT: All right. So I'm going to give you the opportunity now to argue, and direct the Court on there's no obligation to restore here where there's non-distributable income.

ATTY. KIERNAN: Okay. So sure, Your Honor. You know -- and one of the points that I would add to that is, one of the things -- one of the targets here is to give meaning to the balance reduction

privilege, and the balance restoration provision of the contract.

Now, what the plaintiffs say is that all that is meant by the balance reduction provision is that, there's an opportunity for a borrowing -- a temporary borrowing of the employees DCP balances, in the event of -- losses. That there should be no risk at all, attached to it. And that this is a guaranteed obligation that has to be paid without any assignment of any risk.

And the answer to that, Your Honor -- I guess there's multiple answers to it -- But that's antithetical to the contractual statements of purpose about what the reasons was for setting aside a portion of people's conversation instead of paying it to them immediately.

And it's also antithetical to the contract language that reads -- language out of the contractual provision. So we talked a lot in our briefs about the statements of contractual purpose. And those purpose -- those statements of contractual purpose carry weight, Your Honor, in an attempt to -- a contract in what the English Court of Appeals call a coherent scheme.

And those purposes included, to align the interest of executives with those of AIG. AIG is equity owner, where the aligned interest -- equity

owner when there are losses, it loses money. To a cause AIGFP executives to share in the risks of AIGFP enterprise.

So when they said the entire purpose of this agreement is to have it be risk-free, they're at odds with this statement of purpose of a -- of sharing risk.

THE COURT: And for the record, that's on page two --

ATTY. KIERNAN: Yes, Your Honor.

THE COURT: -- of the compensation plan; correct?

ATTY. KIERNAN: Yes. You're exactly right, Your Honor. That page -- At page two it also talks about focusing on the long term returns of AIGFP. And so here, when you have a system where portions of past profits are held in a deferred account, and subject to reduction as a result of the circumstances when those profits turn into losses, you net that, that is a focus on alignment of long-term interests.

In a way that their theory that there is no economic effect on their rights associated with losses that occur while these funds continue to be held is not. It also says, former portion of the capital base of AIGFP, and at the bottom of the page --

THE COURT: What provision is that, Counsel?

ATTY. KIERNAN: Same page two, Your Honor.

(Pause)

ATTY. KIERNAN: Under the plan -- sorry -- such -- the very last line on page two has two important other points. Such retention would form part of the capital base of AIGFP. And then it says, absent losses, they will be paid subsequently.

Absent losses which exhausts current year revenues and reserves. In other words, the whole idea of payment is subject to there not being losses that exhaust current revenue and reserve. So you see these purposes that are plainly designed to cause a risk here.

Now, the plaintiff's saying no, no, no risk. This is a borrowing. The other problem they face we're calling a borrowing, is that there's no language anywhere in the DCP that refers to what happens in the event of losses as a borrowing.

In fact, if you look at the SIP in its statement of purposes, subsection four of its first page, you'll see a description there -- (Pause) -- subsection four, one of the purposes is insuring that amounts are available to absorb losses in the event that AIGFP realizes losses.

And so, absorption of losses --

THE COURT: Is that -- I'm looking at subsection four. You're talking subsection four on page five?

ATTY. KIERNAN: Of the -- of the preamble on page one of the SIP.

THE COURT: Okay. Got it. Thank you.

ATTY. KIERNAN: Purpose of building, maintain formation of capital, including for purposes of insuring that amounts are available to absorb losses in the event AIGFP realizes losses. And actually, plaintiffs use the term absorption of losses to describe the purpose in their brief.

Absorption of losses isn't a borrowing, Judge. Absorption of losses is that when there are losses, you take some funds out of the DCP account and put them so that they're absorbing losses.

And it's not absorbing losses to do what plaintiff suggests had to be done here, which is you take the money out of the account one year, and then you put it back immediately the next year, even though the losses are continuing.

No losses have been absorbed in that circumstance. So --

THE COURT: But it's not limiting the losses to the year in which the compensation was put into the account; correct? It's just absorbed losses in general?

ATTY. KIERNAN: Correct. Correct. But the mechanism for doing that, Your Honor, is the balance reduction mechanism that is the first sentence of

4.01.

So in this context of -- and you need to give -- the contract needs to give meaning to this provision, and plaintiff's interpretation of the reduction and restoration provisions put together is that, they end up being effectively, an economic nullity, that you take it away and you give it right back a year later with interest.

But by the way, you didn't need this provision to have AIGFP have use of the fund money. They already had use of the money under the plan. And they were already paying interest on the money that they used under the plan.

So what was contemplated? I think that to find out the answer to that question you really need to look -- we should look together at the language of the first four sentences of section 4.01b, which starts on page 15 of -- the bottom part of page 15 of -- umm

THE COURT: Sorry, the bottom part of which page?

ATTY. KIERNAN: The bottom part of page 15 of the DCP --

THE COURT: Of which agreement? The SIP?

ATTY. KIERNAN: The DCP.

THE COURT: DCP.

ATTY. KIERNAN: Yes.

THE COURT: Okay. Subsection B?

ATTY. KIERNAN: Yes. And we -- and you have to give meaning to the restoration provision, based on looking at this entire provision together, because it's combined with a balance reduction provision. So the balance reduction provision says -- is captured in the first sentence.

And I'll read the relevant language, Judge that I -- I'm skipping some language that doesn't change the meaning, and trying to be faithful to it, but I'll just sort of simplify it. It says:

The outstanding balance is credited to the deferred compensation accounts of each participant in AIG -- both of them -- shall be subject to reduction to the extent of any losses incurred -- and skipping down a couple lines -- which losses for any year in the aggregate exceeds the outstanding market and credit reserves and current year income of AIGFP.

Now what does that mean? What that means is at the end of each year, in the aggregate, you could look at the reserves, if there are any reserves. You'd look at income; all positive -- and that's trading income and all profits. And then you look at all items of loss and expense. And if the answer is that you have a net loss, then the account balances are subject to reduction. That's what this says.

And it was this provision that was the basis for

if there had been a loss of a few hundred million dollars, the account balances would have been reduced by that. It was this provision that was the basis for the reduction of the account balances to zero in 2008, when the --

THE COURT: But I don't think -- Correct me if I'm wrong. The clients aren't disagreeing with that; correct? That --

ATTY. KIERNAN: No, but I think --

THE COURT: They have the ability to go in and reduce the balances. Is that correct, Attorney Perlstein?

ATTY. PERLSTEIN: Yes. We -- Our fight is not that they had the ability to reduce the balances. Our fight is that they had an unequivocal obligation to either restore them or come up with a plan.

THE COURT: Right. Okay. Thank you.

ATTY. KIERNAN: Okay. All right. So -- But to understand what the restoration obligation is, you have to understand what the balance reduction mechanism is, because they obviously are linked together. They come two sentences apart.

So if I may, Judge, let me just go to the restoration obligation, and then illustrate how we say this language applies in a variety of different scenarios. And that may sort of help clarify what we think is the correct interpretation to -- and the

restoration provision.

So you see that the next sentence has such reductions, that is the reductions in year of net loss should be made among the participants at AIG on a pro rata basis. And we all know what that means; 70, 30 between AIG and the participants.

So AIG got its bank balances reduced to zero too, as owner. And among participants pro rata, according to share of the total…. I don't think that's controverted either.

Now the next line is AIGFP shall be obligated subsequently to restore amounts so deducted from participants in AIG's account balances, plus accrued their interest thereon. And in connection therewith, the board shall adopt a plan, which shall not be subject to the approval of AIG or the participants setting forth the schedule under which AIGFP shall restore amounts deducted from participants in AIG account balances.

The sentence after that talks about the last provision. But let me stop there for a minute, if I may, Judge, and suggest how we -- suggest these provisions -- these two provisions work together, because we think they clearly are supposed to work together.

What happened -- What do you do in a year of losses? What you do in a year of losses is, you read

the first sentence. And it says that, in a year of aggregate net losses you reduce the balances. Do you restore those balances in that same year?

No, you don't. In a year of net losses you reduce the balance. And in the next sentence -- the reduction provision says, AIGFP shall be obligated subsequently to restore amounts. That is, in another year, not in the year of the net losses. In another year you're obligated to restore amounts. Okay?

So that in the first year of losses, I think we're all agreed, you just reduce the balance. Now let's examine two scenarios for year two. Let's assume that the balances were not reduced to zero at a catastrophic meltdown, but that there were just some losses.

Okay. So assumption number one is, let's assume -- scenario number one is that in year two AIGFP reverses its (Indiscernible) for the prior year --

THE COURT: If you could raise your voice, Attorney Kiernan, please?

ATTY. KIERNAN: Sure.

THE COURT: Thank you.

ATTY. KIERNAN: Sorry. Let's assume that in year two AIGFP reverses its bad outcome from the prior year, and generates net profits. How do you apply these provisions? When you look at the first sentence and you say, is this a year of net loss?

No. So the first sentence doesn't apply.

Then you look at the restoration provision and you say, is this provision applicable? And the answer is that the debt -- this provision creates, as it were, subsequent to a year of net losses. This creates an occasion to restore.

Now, why do I say occasion to restore, because it's notable that the restoration provision doesn't say anything like, AIGFP shall have to restore as fast as it can at the first opportunity, or anything like that. It says, you shall do so subsequently, pursuant to a plan.

And interestingly, the plan is one that goes out of its way to say, doesn't -- isn't subject to the approval of the participants, either AIG or the executives. In other words, there's a lot of discretion over the application of this plan. But there's no debate between us, I think, that there is an occasion to restore them.

Now as -- the application of this restoration provision would not put the plaintiff that the executives and the plan balances in the condition that it would have been if there'd never been a loss, for reasons I can take the Court through, if you'd like me to take you through.

But there would be an occasion to restore. Okay. So let me hold that for a minute.

THE COURT: Well, the question I have is, it doesn't limit the company, according to these terms. I think this is what the claims are arguing. Restoration's not limited to when there is profit distributions. I mean, restoration can occur -- say AIG decides to give AIGFP 20 billion extra in funds.

I mean -- if there's the opportunity to restore AIGFP could do that. And it's not restricted to whether or not in subsequent years it's profitable. That's what I understand the argument of the plaintiffs to be.

And if they were to get funding from some other source -- you know -- will they have that obligation to restore?

ATTY. KIERNAN: So let me go --

(Cross-talk)

THE COURT: Am I misinterpreting the plaintiff's argument?

ATTY. KIERNAN: I understand them to be arguing exactly as you say, Your Honor.

(Cross-talk)

THE COURT: -- confirm with Attorney Perlstein. Is that what the claims are arguing? It's not tied to profitability. It's tied to whether or not there was funding -- any source of funding they could have restored?

ATTY. PERLSTEIN: Your Honor, our reading of the

plan in looking at the -- restoration provision is that there's simply no condition that there be distributable income before the obligation to restore or adopt the plan. You know --

THE COURT: And you would have distributable income if there's profit -- profits are there; correct?

ATTY. PERLSTEIN: Right. That's -- distributable income and profits mean the same thing, and out point is that there's no condition of profits on the obligation to restore or adopt the plan.

ATTY. KIERNAN: So let me turn directly, Your Honor, to scenario number two to demonstrate why we contend that there is a requirement of profitability.

(Cross-talk)

THE COURT: -- a requirement for profitability or distributable income in order to do the restoration plan?

ATTY. KIERNAN: So let me show you how that operates. It happens in two ways by operation to contractual language I just identified, Judge. Let me just say by way of overview, this is a profit-sharing plan. It is focused on the shares of profits. It is not focused on-- there's no provision in the contract that says, you should pay based on ability to pay.

Our payments were made based on the

profitability. But let's go -- So let's go to year two. And let's assume that instead of the scenario I just painted for you, where in year two that there was profitability, let's assume that after a year of losses in year two, there's another year of losses. Okay?

So what' plaintiffs are saying is that, notwithstanding the additional year of losses, you have to now restore benefits. And we're saying, no, that you don't -- that you -- a second year of losses. What you do is reduce the fund balances again, by that amount of losses.

Now we get there, Your Honor, in two ways. They're both -- they're somewhat different. They're related, but there're actually two different ways. The first is, we got to look at sentence one and sentence three together.

Sentence one says, if there is a year of aggregate loss, you reduce plan balances. So as in year one, you have a year of aggregate net loss. You reduce plan balances. And if there's a subsequent -- you (Indiscernible)

If in year two you had an aggregate net losses in year two, you reduce plan balances again, and you -- when do you restore? Subsequently. Not in the year of the loss. What the government provision for what happens in the year of the loss is the first

sentence.

The second sentence says, you shall subsequently restore. So what you do is the obligation for restore -- for restoration doesn't arise in the year where there's a reduced -- a loss, that's governed by the first sentence.

The obligation to restore arises when you have a year where there are no net losses. In other words, a year of profitability. And that falls directly from the language of the provision. The language -- the provision doesn't say, you have to have profitability, but that's what reading one and three -- sentences one and three together yields you. That's number one of the result.

Now there's a second route to the same result. The second route to the same result says -- is simply an application of arithmetic. That says, let's assume you just reject -- you reject what I just said, even though I think the plain language pretty clearly provides that way.

And you say, no, there's an absolute obligation to restore, even in a year of net losses, even though sentence one says you're supposed to reduce plan balances -- net losses. Then let's suppose -- So let's suppose you have negative profits for a year. And you have to -- you're now opposing an --

Let's say the negative profits are $100 million.

And you are now saying, no, you also must restore $200 million of fund balances. What happens when you restore those $200 million of fund balances?

What happens when you restore those $200 million of fund balances? What happens is, that has a cost. Restoration of balances costs money. And that cost goes to what your net loss is worth. And your net losses of $100 million, just became net losses of $300 million, because the net income for the year -- the net loss is affected by the cost of restoration to the extent of the amount of the cost.

What that means is that, it's a matter of simple arithmetic, that whenever you restore in your net losses, the cost of the restoration and the increase in your net losses cancel each other out, leading to a -- ultimately, an addition and a subtraction again.

It's what the English Court of Appeals --

THE COURT: I think the agreement says that everything is going to be paid back. The restoration plan shall provide any restorative amount should be paid in 2013. So you're going from 2008 to 2013. You might have loss, loss, loss up to that point.

So the point is, when you get to 2013, pursuant to a plan that was supposed to be made up by AIG Financial Products Group, what happens? Do you have funds to restore at that point in time, or does it lapse? Does the obligation lapse?

ATTY. KIERNAN: So two pieces about that. First, what the plan says is that any restored amounts have to be paid in 2013. What we're saying is that by 2013 there would be no restored amounts.

THE COURT: Right.

ATTY. KIERNAN: That because with each year there was another loss. With each year's loss, whether you go route one and say, in a year of loss you're governed by provision in sentence one, and not by sentence three, or you say, even if you restore the restoration gets taken right away.

You end up -- It doesn't say that any word is an important one, because what he's talking about is two different things; restoration and payment which is a deferred compensation plan are different. The other thing about that sentence, Judge, is when you look at the statement, the extend amounts not restored -- are not restored by the end of December 30, 2013, (As said) the obligations for -- will lapse.

It inherently follows from that, as the English Court of Appeals recognized that that provision contemplates that there could be circumstances where you legitimately have not restored by December 31st, 2-13.

THE COURT: Well, I think that's what the lapse --

(Cross-talk)

THE COURT: -- for right? I mean, if you haven't -- by 2013, that's your argument; that if you haven't restored it in that five years, or within that five years, then it's over?

ATTY. KIERNAN: But I'm starting one step earlier, Judge. What I'm saying is, the English Court of Appeal asked the plaintiffs and we asked the plaintiffs in our brief, so what's the scenario where AIGFP has --

THE COURT: I need you to raise your voice, Attorney Kiernan.

ATTY. KIERNAN: Sorry. We asked -- the English Court of Appeal asked plaintiffs. They recorded their answers. And we asked plaintiffs in our opening brief; what's the scenario where balances are legitimately not restored before 2013?

And they say, well no. You have an obligation to restore. We say, we only have an -- so they have no answer to how you could --

THE COURT: All right. Attorney Perlstein?

ATTY. PERLSTEIN: Thank you, Your Honor. And I do -- I wanted -- So taking a step back, what I want to show is why our reading that there are no condition on the obligation to restore or adopt the plan is reasonable for purpose of a motion to strike.

And I'm going to show that there's no express condition. And there's no implied condition. I also

want to address what Mr. Kiernan said about 4.01, and how the reduction and the restoration provisions work together.

And I also, in terms of the question that Mr. Kiernan just asked, like what is it that they're supposed to do, and when may you not restore? This is what we say they are fundamentally breeched. Right? You have an obligation to adopt a plan.

If you get to 2013, you still have an obligation to kick out that date if it won't violate 409a of the tax code. And you still need to try. You can't just wind down. So like -- I'm going to go through this a little more technically, but just a fundamental level. Right?

They had to adopt a plan. They had to extend the date. They had a trial. And they did none of those things. But take -- if Your Honor would bear with me for a moment. Just taking a step back, Mr. Kiernan is very (Indiscernible)

THE COURT: Attorney Kiernan, I'm just going to ask you to mute your microphone, please. Thank you.

ATTY. PERLSTEIN: Thank you, Mr. Kiernan. Mr. Kiernan is very focused on this being a profit-sharing plan, and all about distributable income. And I feel before we get to section 401, I think it's important for Your Honor to understand that, we don't agree with that reading of what is termed, the

deferred compensation plan.

When my clients earned compensation, it was paid part in cash. And it was paid part in deferred income. And I won't walk you through that again. Mr. Stamatopoulos did that. But the plans set out that there were mandatory referrals -- deferrals, and voluntary deferrals.

So this was not a profit-sharing plan, primarily. There was a profit-sharing component that was the additional return payment. But that was only a component of it. And as you look, that was Mr. Stamatopoulos.

When my clients were paid, they were paid a notional bonus amount. That was the cash piece, and the deferred piece. And as Mr. Stamatopoulos pointed out, that was not defined with reference to distributable income in any way. That was not tied to profits. It just said, cash and deferred.

But then, there -- when you get to the additional return payment, then you do see that. So if you look at the additional return payment section, and that's section 3.04. That was the additional return payment.

THE COURT: And that's in the DCP; correct?

ATTY. PERLSTEIN: Yes. I'm sorry. All of my references are to the DCP. And while the DCP is count one, and the SIP is count two, for purposes of

the breech of contract, there I don't -- there's no really effective difference in the provisions. It's the same provision, so I just have cited the DCP.

But -- So when you get to the DCP, first of all, they actually term it an additional return payment, as separate from the notional bonus. And in this says, this does specifically tie it to distributable income.

If you look at the bottom of the page on page ten, going on to the top of 11, for the avoidance of doubt, additional return payments shall be paid out of the 30 percent portion of annual distributable income that's allocable to AIGFP employees.

So the distributable income was tied -- I'm sorry -- distributable income, and the additional return payment were tied. It specifically says so. But that is a far contrast, compared to the notional bonus.

So first off, the purpose of this plan -- it wasn't called the AIG Profit Sharing Plan. It was called the AIG Deferred Compensation Plan. And the purpose of this was to defer income to later years, primarily for tax benefits.

They also earned interest on those amounts. And then there was this additional return piece. But this was a deferred compensation plan, to begin with. But then, turning to section 4.01 -- give me one

second, Your Honor.

(Pause)

That is -- right. Going back to page 15 and 16. So as Mr. Kiernan, I think, described, what AIGFP envisioned is that, every time that an amount was restored under the restoration provision, it also created a loss, so that the reduction provision kicked in to reduce the restored balances. That's basically, I think, the sum and substance of what Mr. Kiernan is saying.

And I want to break that apart now. So first of all, the reduction provision itself, doesn't even mention distributable income. So even the clause on which AIGFP must heavily rely, there isn't even a reference to distributable income.

So the notion that distributable income was the lynchpin itself, isn't even supported by the language of the reduction provision. But more fundamentally than that, and maybe this is the important part, nothing in the reduction provision prevented AIGFP from implementing a plan to restore balances, even if it didn't want to restore them immediately.

So the way we think these provisions work, is AIG could borrow amounts when it has losses under the reduction provision. By then it had an obligation either to repay those amounts or come up with a plan to restore them later.

And as I mentioned, that could be from future business operations. It could have been through a sale of assets. It could have been through a bankruptcy. It could have been a new plan entirely.

But AIGFP did none of those things. It just told people, effectively, to go pound sand. And as I think Your Honor pointed out, and I think I've mentioned before, nothing in the reduction provision prevents AIGFP from moving the December 2013 date out.

And in fact, Mr. Kiernan and AIGFP want to read the lapse provision so it ends at December 31st, 2013, all restoration -- all restoration rights shall permanently lapse. And they want to put a period right there.

But the sentence goes on; except to the extent AIG Financial Products Corp. determines that it may amend the plan to provide for payment of the restored amounts without violating IRC Section 409a.

So unless they made a determination that it violated section 409a of the tax code, they actually had an obligation to extend the date out. So this really addresses, is there an express condition anywhere in these clauses, looking at the reduction provision, and looking at the restoration provision, and looking at the lapse provision?

And clearly, there isn't. So there's no express

condition. So then, what we have to ask ourselves, would it -- is it reasonable under these circumstances, on a motion to strike, to imply a condition?

And in our view, under these circumstances, we think Connecticut law would disfavor implying a condition into the DCP. To find an implied condition, the Court would have to find that the condition was a necessary implication, and quite obvious from the terms of the contract, as though the intent was implied, was expressed in fact.

This is a citing to the Elevator Services case, which is on page 15 of our brief. As Your Honor, I'm sure well knows, Courts are reluctant to imply conditions until a contract, especially when dealing with sophisticated parties like AIGFP.

Connecticut Courts also disfavor implying conditions where it would result in forfeiture of compensation, and where the forfeiture falls on a party that has no control over whether or not the condition occurred.

But Connecticut law goes even further than that. Citing on the restatement -- and this is the EH Investment case, which is cited on page 16 of our brief, that case notes, if the occurrence of the condition is not likely to be resolved until after the party has performed, or even prepared to perform,

and the condition is not within the performing party's control, then -- and now I'm quoting -- in case of doubt, an interpretation is preferred under which the even is not a condition.

This is at page 362 of the DH Investment case; again, cited on pages 16 and 17 of our brief. And AIGFP cannot meet any of these in -- any of these tests for implying a condition into the restoration provision.

AIGFP is a sophisticated party. They events occur well after performance. AIGFP employees have no control over the event. It was AIGFP, not our clients, who decided to wind down. And our clients are forfeiting already earned compensation.

By the time this condition occurs or doesn't occur, they'd performed years and years ago. So two avoid meeting this task, AIGFP just simply argues that, the condition arises from reading the contract as a whole.

But frankly, as an initial matter, that argument about reading the contracts as a whole is just another way of saying that, they're trying to sidestep the fact that there's no express condition in the actual reduction or restoration provisions.

Here the condition that AIGFP wants to impose would drastically alter the rights under the contract. A condition with such radical implications

should be readily apparent from the face of the contract. And it's just not.

And our clients are the ones that bear the risk of this condition. Your Honor, in our view, this is not really an issue that can be resolved on a motion to strike. But we think it's clear that under Connecticut law that, the imposition of this condition here is just not supported by the agreement -- the agreement itself.

And that actually, even broadening it out, because I think there was some suggestion that we were not reading the entire agreement, I think we want to show, if you look at other provisions in the contract it actually supports our reading of the agreement.

Certainly enough to show that our reading is reasonable, for purposes of a motion to strike. We think ultimately at trial as well. But there are a couple of other provisions I would point Your Honor towards.

THE COURT: Okay. Before you begin that, Counsel, we're going to -- I want to make sure we break at one o'clock, so that we give our staff the opportunity to get lunch.

ATTY. PERLSTEIN: Oh, sure.

THE COURT: All right. How much longer argument do you think you have, both of you?

ATTY. PERLSTEIN: We've covered a -- probably 15, 20 minutes-ish, depending on Your Honor's questions.

THE COURT: Attorney Kiernan?

ATTY. KIERNAN: Your Honor it depends your questions. I do have some points I'd like to make in response to what counsel has argued so far. But also depends on your questions.

THE COURT: Okay. Attorney Stamatopoulos?

ATTY. STAMATOPOULOS: Yes, Your Honor. For the breech of the covenant of -- it really depends on your questions. If left to my own devices, I think maybe a minute or two.

THE COURT: All right. So we'll break now, and we'll reconvene at 2 p.m. You can just click the link again. That's the beauty of Microsoft Teams, is it's available all day, and we can get back into our meeting. All right.

(Whereupon the Court recessed for lunch)

(S. Jerry-Collins ends transcription)

* * * * * * *

(Start of excerpt; transcribed by C. Plavcan)

(RECESS)

ATTY. PERLSTEIN: Thank you, Your Honor.

THE COURT: Just a second, Attorney Perlstein. I need the court reporter to tell me we're back on.

(Pause)

THE MONITOR: Okay, Your Honor, we're on the record.

THE COURT: All right. Thank you. All right. Attorney Perlstein.

ATTY. PERLSTEIN: Thank you. Your Honor, I think I was just about to point out some of the other provisions that support our reading of the agreement and demonstrates that for the purpose of a motion to strike. Our reading of the agreement, that the obligation to restore or come up with a plan, is an unconditional obligation and importantly, not tied to profits or distributable income.

THE COURT: Okay.

ATTY. PERLSTEIN: So the first provision and we touched on it briefly and I don't want to belabor it, but I do -- AIG makes the point that you need this condition so risks and rewards are properly shared between its employees and the company. But we believe that the bankruptcy provision demonstrates that the agreement already shared risk and reward in a way that's written into the agreement. And the

contract, as written, already puts plenty of risk on AIG FP's employees, without adding to it.

As Mr. Kiernan mentioned and as the bankruptcy provision makes clear, the employees are unsecured creditors and they enjoyed no priority of payment. AIG also pointed to section 4.01A that states the plaintiffs don't -- do not enjoy the benefit of AIG's general guaranty. Your Honor, in our view, this is already plenty of risk. Our clients took risk on money that they could've received immediately. Indeed, if AIG hadn't been deemed too big to fail and bailed out by the federal government and our employees' money, AIG FP and AIG wouldn't have been before the bankruptcy court, as bankrupt debtors with our clients, you know, as creditors at the bottom of the line.

But in short, as written, the plaintiffs did share the risks by becoming unsecured creditors that were subordinated in junior creditors. But there's nothing in the language of the plans that says profits were a condition to their account balances being restored or AIG coming up with a plan to do so. Instead, as AIG FP says in this reply brief, the employees, quote, would only be paid after full satisfaction of all other creditors' claims. And that's on the reply brief at page 7. That was plenty of risks.

So I think I've touched on the lapse -- I'm happy to go back to the lapse provision, but I think I've addressed that one. So I'm not planning to go back through that. But another provision I would focus Your Honor on --

THE COURT: Well, what --

ATTY. PERLSTEIN: -- if the funds --

THE COURT: -- what about the circu- -- the circuity to that argument, that if all the creditors are paid, what are they paid out of, say before December 2013? You know, are they paid out of the --

ATTY. PERLSTEIN: Oh, you, so actually, this is -- it -- Your Honor, this is a -- this is a perfect segue to the funds provision. And actually, I think the funds provision actually answers that question. If Your Honor turns to page 14 of Exhibit A, not -- not -- not the funds provision, and the funds provision actually answered this -- this specific question.

THE COURT: What section is this?

ATTY. PERLSTEIN: This is -- this section's entitled, 4.01, AIG FP's Liability.

THE COURT: Okay.

ATTY. PERLSTEIN: And we're looking at what is the second sentence? So it says: For the avoidance of doubt and notwithstanding anything else contained herein to the contrary, little one, the payment of

benefits payable hereunder to each of the participants and their beneficiaries and to AIG shall be made only from the general funds of AIG FP Corp. So --

THE COURT: Okay.

ATTY. PERLSTEIN: -- this provision as written, says they're paid from general funds. This supports our reading of the contract as reasonable. It didn't say profits. It did say for distributable income, not you're looking to -- I'm sorry. It did say as to the additional return payment you're looking to distributable income. But for the notional bonus, it just says, cash and deferred, and the funds provisions says it comes out of the general funds of AIG, nothing earmarked.

This supports the notion that payments are not just made out of profits. And again, AIG, and I don't need to belabor the point that AIG FP and AIG were sophisticated parties. But if they wanted to condition as payment on distributable income, they easily could've said so. And they did that for the additional return payment. But they did not do that for the restoration obligation, they did not do that for the notional bonuses. Yet, simply, we would submit, Your Honor, that the funds provision supports AIG FP's use of general funds and not just profits to repay its employees.

And again, on a motion to strike, where we only need to show our reading is a reasonable reading, this is further evidence that our reading of the plans is a reasonable reading and it requires the motion to be denied.

So there are a couple of arguments, then I would like to -- that Mr. Kiernan made either this morning or in the briefing that I would like to address head on. And then, I think I'll briefly touch on the UK decision. But then -- I think then I'll -- I'll -- I'll -- I'll be finished.

THE COURT: (Indiscernible.)

ATTY. PERLSTEIN: So the first of these, AIG in its briefing discusses how a payment to my clients would somehow trigger an illegal dividend to AIG. But we think this notion -- first of all, we think it's wrong as a matter of Delaware law, which will be an issue for discovery, but certainly not an inference you can draw on a motion to strike. And to be clear, the illegal dividend that Mr. Kiernan and AIG FP are talking about is a payment to AIG, not to the employees. Even and -- even the UK court -- and I will a -- address that, 'cause I don't want to leave it unaddressed. But even the UK court noted that AIG FP's own expert accepted, and now I'm quoting, the relevant law only prohibited dividend payments to a shareholder, qua shareholder and did

not prohibit a payment of debt. And that's the English Appellate Court decision at paragraph 73.

But there is no prohibition in Delaware law on paying creditors what is due. The employees here, our clients, are not shareholders of AIG FP. They're not shareholders of AIG. And AIG knows that as well. This argument has no basis in fact and has no basis in law. If AIG FP felt that it couldn't pay out the 70 percent that it owed to AIG, then it shouldn't do that. But that's not a reason not to pay its employees what they already earned and what was due.

Another argument -- well, let me pause there for a second, so if you have any questions about that, if not, I'll move on to --

THE COURT: No, I don't --

ATTY. PERLSTEIN: -- (indiscernible) --

THE COURT: -- have any questions about that. But I would like to hear from Attorney Kiernan on that point, illegal dividend argument.

ATTY. PERLSTEIN: Okay. I can pause here, then. Then I'll pick it back up.

THE COURT: Okay. Thank you.

ATTY. KIERNAN: Sure, Your Honor, just a couple of points on it. First, Delaware law is not a matter that requires discovery. We're not -- unlike the English Court, you don't need evidence of per -- proof of law the -- of a -- another state. This --

this Court can determine that as a matter of law what Delaware Law is.

Second, so -- so it's just a misap- -- application of that, you know, the English Court said, here in England, we need evidence on foreign law. But that's just not true in -- for the State of Connecticut. So that's not an issue that can't be resolved on the -- on a motion to strike.

Mr. Perlstein is correct that -- that the prohibition that we are invoking under Delaware law is a prohibition against dividends to AIG, not a -- not directly a prohibition against dividends to the executives. But what he just said to you is, well, if they can't pay the dividends to AIG, then they don't pay the dividends to AIG, but it -- they should -- should still pay this money to executives. And that actually misapprehends a really fundamental component of this agreement, which is that it -- it must -- there are -- must be seven or eight places where this agreement, including in the balance reduction and restoration provisions, where the -- where the -- the agreement makes clear that the writ- -- that the balances of AIG and executives are supposed to be maintained at a 70 percent, 30 percent ratio, that -- that you don't pay something to one and then not to the other, because that destroys the ratio. And there are repeated times when there are

equalization obligations to make sure that whenever somebody gets something, it goes to AIG and to the -- the executives. And that they're -- that -- and see that in -- in, for example, among other places, the balance reduction, which says that balanced reduction shall happen on a -- on a pro rata basis. That's the second sentence of 4.01B.

The -- and then, it says, reduct- -- restoration of AIG and participants' balance. So -- so when you look at a situation where you say, well, we're prohibited from -- from providing this to AIG, but we can just go ahead and -- and provide it to executives, not so. In order to maintain it -- what -- what we're talking about is this goes to how you interpret the agreement. Should you interpret the agreement in a way that is at odds with -- with its -- it's other provisions and this agreement -- to interpret it as saying, well, it'd be an illegal dividend as to AIG, but not an illeg- -- but not as to executives, so it's okay to send to executives --

THE COURT: And -- and --

ATTY. KIERNAN: -- runs into the profit.

THE COURT: -- and AIG's argument is that the restoration of the AIG balances would be an illegal dividend?

ATTY. KIERNAN: Yes, because if -- and the reason for that is that what -- what the, you know, I

-- you asked two questions. One is in -- is this a -- dividend? And then, second is it at a time when the -- when the company lacks independent financial capability to -- to make the -- the dividend? And the -- the --

THE COURT: Well, but let's put aside whether they have the financial capability to do it. If they're going to restore the balances in the AIG funds pursuant to 4.01, subsection B, when they restore balances to the AIG funds, is that considered a dividend?

ATTY. KIERNAN: Yes, Your Honor. And the reason it is, is that the definition of dividend includes a share in the profits. They -- what Delaware law essentially says is you can only dividend out of profits, out of net profits. And so -- and -- and what -- what are these balances? These balances start as being a share of net profits that was allocated to AIG and to employees. And so this is an allocation of a share of the -- the profits of the enterprise, that that was reduced and now you -- now they're saying, now you gotta pay that share of -- of profits. And -- and so that's an illegal dividend.

THE COURT: Okay. Thank you.

Attorney Perlstein, you --

ATTY. PERLSTEIN: Sure, I --

THE COURT: -- may proceed.

ATTY. PERLSTEIN: -- I'd like to respond to a couple of those points. But then I can move on to the next section. So, Mr. Kiernan started out again focusing on the 70/30 ratio. But again, I would focus Your Honor's attention on the fact the 70/30 ratio applies to distributable income. The notional bonus, however, is not tied to distributable income. They're just -- Mister -- and this is a fundamental difference that we have with AIG FP. AIG FP keeps thinking about this only as a profit-sharing plan. And our view is that it was called the deferred compensation plan for a reason.

The notional bonus just isn't tied to distributable income. So this -- this notion that the 70/30 ratio governs everything, including the notional bonus, we think just isn't a fair inference from the language of the plan. We also -- Mr. Kiernan is saying, you need to interpret the agreement in this way to favor AIG. But AIG drafted this plan. To the extent there's ambiguity, it gets interpreted against them. This is a motion to strike. On a motion to strike to the extent that there's an inference that's being drawn, it's supposed to being drawn to sustain the complaint, not rule against it.

And on the notion of whether this is susceptible to fact discovery, I think the questions Your Honor

asked are exactly the right type of questions. Is this really considered a dividend? Was AIG in a position to pay? Could it A -- could AIG have borrowed -- could AIG FP borrowed [as spoken] against its credit facility to facilitate the dividend? Maybe that was one way they could've met their obligation. There are all sorts of acts that we should be able to understand about what they did, what decisions they made, why they made those decisions, and how that works into -- to meeting their obligation to come up with a plan.

And also, as Mr. Stamatopoulas will address in terms of exercising any discretion they had, in good faith, these are all issues that should be sorted out on fact discovery, but shouldn't be concluded as a matter of law on a motion to strike. So I -- I can -- unless Your Honor has questions about that, I can move on to --

THE COURT: All right.

ATTY. PERLSTEIN: -- (indiscernible) --

THE COURT: Why don't you move on.

ATTY. PERLSTEIN: Sure. So a -- another (indiscernible) --

ATTY. KIERNAN: Your Honor, may I -- may make just one comment?

UNIDENTIFIABLE SPEAKER: (Indiscernible) --

THE COURT: Yes, go ahead, Attorney Kiernan.

ATTY. KIERNAN: On this point? I -- and I apologize for interrupting, Mr. Perlstein.

MR. PENFIELD: No, go ahead.

ATTY. KIERNAN: But just on -- on this one point, I think it's worth looking at Section 3.01 of the -- of the deferred compensation plan, which talks about -- how deferrals are made here. And what it says is the -- the first little I says, participants indicated on Schedule A, sorry. I'm on page 7, Judge.

THE COURT: Yes, thank you.

ATTY. KIERNAN: Participants indicated on Schedule A shall have the portion of the notional balance -- notional bonus amount indicated on (indiscernible) Schedule A deferred automatically. And that's -- that -- that's not new.

Then, there's a -- a long little two little Is about AIG shall have a portion of AIG FP's annual distributable income and otherwise payable to AIG deferred automatically, which portions shall be -- and it runs through a bunch of things. It's all the compensation contributed by partic- -- by all participants in respect to this year, plus everything from prior years, whether it's voluntary or mandatory. But it -- when it runs all the way down, it then says, compared to a -- a -- a fraction, a long -- the numerator of which is seven and the

denominator of which is three, minus what's already in the -- in the account. What that is a long -- the -- I can parse you through the language, but it's a long way of saying that at -- at all times, the ratio of what's contributed has to -- has to be at this 70 percent, 30 percent ratio, so that the balances are maintained at the 70 percent, 30 percent level at all times. It's not a -- it's not a mere incident. That is a core component of the -- of the DCP.

THE COURT: Okay. Thank you.

ATTY. PERLSTEIN: Your Honor, even as -- as to that point, again, 3.01A speaks to the participants piece being the notional bonus amount and AIG's piece being the distributable income amount. Those are just -- those are just defined -- defined differently. And so there's no -- there's nothing that defines notional bonus as coming only from profits. Even that talking about a ratio, doesn't say where it's coming from. It only says to the extent that you want to make -- keep it equal. But it doesn't say -- it doesn't say where funds come from. It doesn't say notional bonus comes from profit. And in fact, the funds provision that I pointed Your Honor to says where the -- where participants are paid from. And that's from general funds of AIG FP, not just from the profits of AIG FP.

So let me -- oh, excuse me. I just -- I'm

trying to skip over the parts of the -- of the talking points that we've already covered in questions.

So I think the next -- the next issue I'd like to address, with Your Honor's permission, is that AIG FP says the need for a plan would be superfluous if the repayment were un- -- unconditional -- if the repayment obligation were unconditional. And I think Mr. Kiernan had said something like that this morning. And AIG discusses that in its brief on page 21.

But in our view, the language of the plan says quite the opposite. Restoring account balances in profitable years would be straightforward. But a plan is necessary in down times in order to have an orderly payout and in order to avoid violating Section 409A. So similarly, AIG FP asserts that the language in the restoration provision referring to any such restoration plan or any restored amounts implies that no such plan is need -- need -- no such plan needs to be adopted unless AIG FP were profitable. But I think this is a great example of AIG FP trying to draw inferences in its favor on a motion to strike.

In our view, a perfectly reasonable reading of those provisions is that this language reflects that no plan would ever need to be adopted if account

balances were never reduced or the amounts could be restored in the short term without adopt- -- without the need for adopting a formal plan. Whatever the reason for this language, it is completely consistent with an unconditional restoration obligation and certainly doesn't warrant striking the complaint without the Court and the parties having the benefit of discovery.

So I think the next thing I -- I do want to at least touch on briefly, because it -- it's sort of been a little bit of the elephant in the room, is the UK and French decisions, which, you know, are referenced in the complaint. But effectively, AIG FP has urged this Court to follow those decisions. But that cannot be the basis for a motion to strike for a couple of reasons.

First, as Your Honor knows, the UK trial court found in favor of the employees. And to be clear, I don't know if this has been specifically said, but I want to be clear about it, the employees that were plaintiffs in the UK action are a completely distinct group from the employees here. So you know, there were a couple of times where Mr. Kiernan said that there were questions put to AI -- the AIG employees. They were never put to us. They were never put to my clients. It was a completely different client. It was a completely different base. My understanding is

the UK group or the employees in the UK. And as we articulated in the complaint, this group are the employees in Connecticut. So we understand that the Appellate Court reversed that decision.

But for purposes of determining whether positions are reasonable, you have UK judges that are all over the map, as well as two French Court decisions that came out in the -- the employees' favor. Now, in its briefing, AIG tries to distance itself from the French decisions, where the French employees ultimately prevailed. But what AIG said in -- said in its brief is, and I'm quoting, as a matter of French law and policy, all bonuses must be treated as noncontingent and payable. And that's on page 17 of their brief, footnote 2.

So AIG FP would have this Court credit that one of the most sophisticated entities -- sophisticated global entities in the world, entered it into contract that was void under French law. You know, or the other theory, and we think on a motion to strike should be drawn in favor of us, is that the agreement was drafted to be consistent with -- with French law and the bonuses were, in fact, noncontingent. I think drawing all infer- -- all inferences in a manner favorable to sustaining the complaint, this again supports denying, not granting, a motion to strike.

But in any event, we think this Court is far better equipped to apply Connecticut law to resolve a Connecticut dispute. And frankly, although I'm sure the UK Court tried, there were principles of Connecticut law that just weren't discussed in the UK opinions. There was no discussion of specific provisions prevailing over general ones. There was no discussion of Connecticut courts disfavoring implied conditions. And there was no discussion that a party cannot take advantage of a condition that arises from its own inaction or decision. None of this -- were -- is in the -- in the English Court proceedings.

So and as I mentioned, there were also key aspects of discovery that was lacking. There was no discovery that we saw from the record or from the decision itself, not that we had -- we didn't have access to the discovery to be clear, but from the decisions, there was no discussion of whether or not AIG could've extended the date on the last provision. There was no meaningful discovery on the illegal dividend point that we could see. And there was no discovery on how the bankruptcy provision informed the obligation to unconditionally repay the plaintiffs.

So I don't want to belabor this point, but certainly, there -- there's no argument that the UK

decision is controlling on Your Honor. And --

THE COURT: Well, I --

ATTY. PERLSTEIN: -- we don't think that --

THE COURT: -- I don't believe it is. Exhibit --

ATTY. PERLSTEIN: Yeah.

THE COURT: -- to the Court and the Court will read it.

ATTY. PERLSTEIN: Yeah. That's --

THE COURT: I will apply Connecticut law.

ATTY. PERLSTEIN: Right. So I -- I -- I don't want to -- I don't really want to belabor that point. So I think the, you know, the last thing I would mention and then I think I'm -- either you could hear from Mr. Kiernan or Mr. Stamatopoulas on the duty of good faith and fair dealing claim. But just to be clear, so I'm gonna mention this -- the top of the argument, the second plan of issue, which has come up a couple of times, is SIP, which required compensation deferral the same way as the DCP. It was entered into in early 2008. And you know, AIG FP had admitted that the purpose of the SIP was for the benefit of certain executives whose 2007 bonuses were negatively impacted.

THE COURT: Okay.

ATTY. PERLSTEIN: But in short, the SIP was a way and an effort to get employees to stay. And AIG

FP admits that the SIP had the same reduction in restoration provisions, so they really -- for purposes of the motion to strike are looked at in the same ways. But I think to be clear, the plaintiffs entered into SIP because they were assured that the SIP provided for repayment unconditionally. And we -- we allege this on paragraph 162 of the complaint. And given that the DCP and the SIP, the repayment language is identical, it really does stand to reason in a fair inference in our favor on a motion to strike that AIG had the same understanding of an unconditional repayment with respect to the SIP that it did with the DCP. And I think that really is the segue into the discussion of the breach of the duty of good faith and fair dealing claim. So unless the Court has any questions, I'll -- I'll turn it over to --

THE COURT: Well, I going to --

ATTY. PERLSTEIN: -- Mr. Stamatopoulas.

THE COURT: -- turn it over to Attorney Kiernan first, so that he can address anything that you've raised. And then we'll go to the breach of good faith and fair dealing claim.

ATTY. PERLSTEIN: Thank you, Your Honor.

ATTY. KIERNAN: Thank you, Your Honor. I do have a couple of comments. (Indiscernible) --

THE COURT: I can't hear you, Attorney Kiernan.

Can you please speak up?

ATTY. KIERNAN: Sorry. Is this better, Your Honor?

THE COURT: Yes. Thank you.

ATTY. KIERNAN: Okay. Thank -- thank you. And I apologize. I don't know why the volume is -- is falling short. I -- I -- we -- I have a couple of points that I want to address that counsel have raised. First, and let me stress that we are not trying to sidestep the contract. We are not trying to add a term to the contract that is not already there. And the characterizations of us doing that are not appropriate or accurate characterizations. What we are saying is that you have look at the contract as it's written. The part -- and in particular, what we're saying is that one of the things you can't do is ignore provisions of the contract. And one of the most important provisions that's being ignored is in their apparent argument that in a year of -- of -- after a year of -- of -- of negative losses, in subsequent years, you have to restore, even if there are losses. And in doing that, you apply the restoration provision and read out of the contract that first sentence of Section 4.01B.

That first sentence of section 4.01B tells you what you do in a year of aggregate net losses. What

you do in a year of aggregate net losses is not restore. What you do is reduce account balances. And that -- and -- and so the -- the -- now whether -- whether you go by the route I identified that says that you don't re- -- restore in any year of negative balances because you reduce balances and -- and -- and the restoration obligation applies subsequently, as the language says, or whether you say, no, there's still a restoration obligation, but you add the cost of restoration to the negative balances.

Either way, so long as you continue to apply 4.01B first sentence, which says that balances are subject to reduction in a year of -- of aggregate net losses, then you end up not restoring in a year of a -- of negatives and restoring in years where there are only positive profits. And that's just an interpretation of the contract. That isn't a -- an -- a reading of the language in. It's a not reading language out, which is what plaintiffs are proposing to do, Your Honor. And -- and -- and that's kind of a fundamental a -- a point. It's -- it's built into giving meaning to the reduction and restoration mechanism. What you hear in plaintiff's argument is an attempt to characterize this contract in a way that deprives the reduction and restoration mechanisms of actual economic effect. And your -- and another maxim of contract construction is that

you read contracts in in an effort to give meaning to their terms. You also that that that understanding that you apply the reduction mechanism in any year of negative of -- of aggregate net losses dovetails with the -- the -- the important prescriptive statements in the -- in the first paragraphs of the -- of the contract document that we've already referred to. The sharing of risks, the alignment of interests with those of AIG FP, which is not achieved by plaintiffs reading, and is significantly the specific statement in that preamble and that directive language at the beginning that says that one of the purposes here is to distribute the balances to employees or executives, absent losses which exhaust current year revenues.

And -- and when losses exhaust current year revenues, you don't distribute to -- to plan beneficiaries. So we are not emphatically reading language in. And that's something The English Court of Appeal, we'll get to the English Court in the significance of it. I'm not saying it is binding on you, Judge. We know that it's not binding on you as a matter of collateral estoppel. But what it is -- is three smart judges who heard three -- three days of oral argument an read a lot of briefing and said this can be resolved as a matter of law. I don't need external testimony from people who didn't --

what the -- what this plan means to people who played no role in writing it. I don't need to find out what -- what the asserted attention was of the people who drafted it in -- back 1995, now 26 years ago. We can tell from the four corners of the -- of the agreement what was meant here. And what was meant here is that -- that you reduce balances in a year of negative -- of -- of aggregate net profits and you restore in years where there are profits to -- to -- to distribute. And that, as I say, comes from the language of the agreement.

Excuse me. Let me just -- trying to read my incomprehensible handwriting for a second.

THE COURT: (Indiscernible.)

ATTY. KIERNAN: Sorry. The -- the -- the -- the suggestion by plaintiffs that talking about profits and losses is an irrelevant component of the restoration obligation, that if there are any -- is any money available or any assets available, well, that can be used to repay the -- the -- the to -- to do the restoration. Your Honor, again at the -- that's -- that's -- that's not supported by the agreement. The agreement says that in years of losses, you reduce balances. And that -- that is not focused on whether there is an asset available to pay. It an -- an ability to pay is not a relevant component of the reduction and restoration mechanism.

What's a -- what's the relevant component is, is this a year of profits or is this a year of losses? If this is a year of losses, then you reduce balances. You do that -- it doesn't say -- that not the end of the first sentence of 4.01A says -- four one -- sorry, 4.01B says, balances shall be subject to reduction if there are no assets around. What it says is balances are subject to reduction if there are aggregate net losses for the year. Because this is a performance-based measure --

THE COURT: Well, why --

ATTY. KIERNAN: -- in the --

THE COURT: -- I think what plaintiffs are arguing is there is no counter provision that said restoration occurs when there are aggregate net profits.

ATTY. KIERNAN: It doesn't need to say that, Your Honor. But --

THE COURT: Uh-huh.

ATTY. KIERNAN: -- but it doesn't need to say it because -- because 4.01B first sentence still applies in a year where -- where you -- and whether you say there's a restoration obligation or first of all, it does say, shall be obligated to restore subsequently. And so what that means is subsequently to what? It -- it -- it's -- it's a direct reference to the prior sentence about reduction. So what happens is

subsequent to a year of aggregate net losses, you will you restore. But not any year of aggregate net losses. If you have a succession of years of -- you're turning to the language, Judge. I'm at the top of page 16.

THE COURT: Thank you. Right.

ATTY. KIERNAN: Obligations subsequently. So in a year of net losses, you don't restore. In a year of loss -- in a year that is subsequent to years of net losses, you do restore. But the provisions are linked to each other. And this comes from the language of the agreement, Judge. And -- and by the -- and then we've -- as we've argued it in the alternative, even if you say there's an obligation to restore, that increases the loss that in the -- in the net losses, it still has to get subtracted and that restored amount gets completely negated. And that's something that the English Court of Appeal also recognized in paragraph 85 of its opinion, the -- calling what he described it as circuity, that in -- in a year where there's net losses, any restoration will be negated right away by the costs of restoration increasing the loss.

Either way, what we're talking about is not adding a term to the contract. Now, the -- the restoration incre- -- provision is written generally because it was a provision of general application.

But the specific application of it does not negate the applicability of the first sentence of Section 4.01B, in all circumstances in any year where there's a year of -- of aggregate losses. So -- so it, although it's not in the restoration provision, it's in the sentence that immediately precedes it and that is linked to it, that the restoration comes not in years of aggregate -- of aggregate losses.

Now, if I could, I'd -- I'd turn to -- so -- so for -- for example, there -- there -- and they -- counsel pointed to you the provision that said that payments will be made only from the general funds of AIG FP. That -- that's not inconsistent with saying that they -- they will be made only in circumstances when -- when there are no net losses in a year. That's just a -- it's a statement about where the payments come from. And if you look at that first sentence of 4.01A, it's in conjunction with saying, you --

THE COURT: Are you arguing --

ATTY. KIERNAN: -- get no special deal.

THE COURT: -- that general funds is equal to distributable income?

ATTY. KIERNAN: No. What --

THE COURT: Okay.

ATTY. KIERNAN: -- I'm saying, Your Honor, is that plaintiffs have misread what that paragraph --

if we can look at 4.01A.

THE COURT: Okay.

(Pause)

ATTY. KIERNAN: What it says is, what 4.01A is, is about is how the executives get no special treatment. So what it says is the benefits payable hereunder shall con- -- constitute an unsecured debt of AIG FP to the participants, shall not have the benefits of any guaranty of AIG of payment obligations. The avoidance of -- of -- of doubt, the payment of ben- -- benefits payable hereof -- in -- on -- hereunder shall be made only from the general funds, in other words, not from anything else.

And two, AIG FP shall not segregate or earmark any assets, nor hold any assets in trust or special account for this purpose. And none of the participants shall have any equitable or illegal interests or lien on any asset. And then it goes on to the bankruptcy about they're last in line. What this paragraph is -- is about is executives have no special deal here. It isn't -- it isn't addressing payments out of -- out of profits, will pay -- or what happens in the year of -- of -- of aggregate net losses. What this paragraph is about is the -- the no special treatment of any kind goes to these executives. In fact, very much the opposite; they're last in line. And not -- that's what this provision

is about. It doesn't -- doesn't change the analysis of the interpretation of whether there is an obligation to reduce balances any year of losses.

And -- and, Judge, and so you hear plaintiffs say that there was a bankruptcy risk here. And so that was all the risk that was needed under the contract. But, you know, more than -- more is required than that, Judge, because the -- the prescriptive language at the beginning of the contract didn't just say that we want to sub- -- we want to subject AIG FP executives to the risk of bankruptcy. What it said is that they wanted to share in the risks of the operations of AIG FP. That includes the risks of loss that for all kinds of reasons don't add up into bankruptcies, and said that they want to align interest with AIG FP.

You can have (indiscernible) --

THE COURT: I have a question for you, Attorney Kiernan, on the bankruptcy issue. If AIG Financial Group had filed for bankruptcy under the circumstances which you described, is it AIG Financial's position that the plaintiffs would not be an unsecured creditor?

ATTY. KIERNAN: No, they'd be an unsecured creditor, last in line, Judge. But what it -- what we -- what I'm saying is as a practical matter, they don't --

THE COURT: Well, but what --

ATTY. KIERNAN: -- dispute that there's a --

THE COURT: -- is it that they're an unsecured creditor for? I mean under your -- your analysis, during the years twenty -- 2008 to 2013, there's nothing, their deferred compensation plans are reduced and they're not entitled to anything back. So what are they an unsecured -- unsecured creditor for?

ATTY. KIERNAN: So -- so the compromise for bankruptcy purposes is that -- that the -- their -- their claims for the amounts of original deferred compensation that were eliminated are -- are conceptually allowed in the bankruptcy. But they are dead last in line. And so those claims have no value. In -- in most bankruptcies --

THE COURT: Well, it --

ATTY. KIERNAN: -- the people who are most --

THE COURT: -- doesn't mean they don't have no value [as spoken]. It means they're an unsecured creditor in line.

ATTY. KIERNAN: Well, but it's -- it -- but it's more than that, Judge, more than just unsecured. The language of the provision is: unsecured, subordinated, and junior to all -- to all other creditors. And -- and four one A then goes on to say all kinds of things about they shay [as spoken] --

shall not be paid until all other creditors have been satisfied. And so when you've got in front of them multi-billion-dollar debt owed to AIG, they are dead out of money. They -- they took it --

THE COURT: But -- but they --

ATTY. KIERNAN: -- out what --

THE COURT: -- still have --

ATTY. KIERNAN: -- they owed the --

THE COURT: -- a dollar figure that's owed to them on that schedule, correct, even though they are an unsecured creditor?

ATTY. KIERNAN: It is -- it is theoretically owed to them under this -- under the schedule, but -- but has no actual economic value.

THE COURT: All right. So that's if there is a bankruptcy situation. So if there's no bankruptcy situation, are you arguing that nothing is owed to them --

ATTY. KIERNAN: Correct.

THE COURT: -- from 2008 to 2013 if there's no bankruptcy?

ATTY. KIERNAN: It -- if in circumstances where there has been no -- no year that -- that featured gains and in -- in the circumstance where every year since 2013, there's been a year of aggregate net loss, and every year since 2008, and that's not just in 2013, it's to the present -- and where there's

been a aggregate net loss every year, then there is no restoration owed. Yes, Your Honor.

THE COURT: Okay. Now, if -- if they -- if AIG filed for bankruptcy in 2012, would they have a claim?

(Pause)

ATTY. KIERNAN: They have a --

THE COURT: (Indiscernible) --

ATTY. KIERNAN: -- claim, but no recovery.

THE COURT: -- that were taken out?

ATTY. KIERNAN: They would've had a claim, but no recovery. That's right. That was given to -- it was given to them contractually and then taken away from them by their -- the order of -- of -- of strength of their claim -- by putting them last.

THE COURT: So if AIG --

ATTY. KIERNAN: What it essentially said is --

THE COURT: -- Financial had filed for bankruptcy during those times, they have a claim, because AIG Financial didn't file for bankruptcy, they had no claim during that time?

ATTY. KIERNAN: Correct. Correct, Your Honor. But -- but the -- there -- there was a compromise here. They -- they had a claim, but the claim had no value. It was given -- it was allowed to technically exist because what they were saying is we don't have any objection to paying your deferred balances, if

everything else, everybody else is satisfied and there's money left over at the end of the day. But by the way, I'm not familiar with a bankruptcy where the people who are last in line got a piece of the action. That's -- the consequence of bankruptcy means that you've reached a position of an inability to pay your debts and -- and so, people don't get paid their debts. And so it was a theoretical, but not practical concession to them, yes, Your Honor.

THE COURT: Attorney Perlstein, (indiscernible) --

ATTY. PERLSTEIN: Thank -- thank you, Your Honor. And I'll -- I'll -- I -- you've been very indulgent, which I appreciate, so I'll try to be brief on a number of these points.

So AIG says you need to look at the entire contract and that you shouldn't read anything out of the contract. We agree with that. You should not read anything out of the contract. But what they really say -- they say we're reading the reduction provision out of the contract is what I heard Mr. Kiernan say. And again, they're coming back to this reduction restoration loop, that every time there's a restoration, there's an automatic reduction and it works in this like vicious loop. This argument, Your Honor, is really a strawman argument. It comes down to the same issue that ignores the

obligation to adopt a plan. It's the same issue in the preamble about being paid pursuant to a schedule absent -- absent losses that exceed current year income. The whole notion of a payment according to a schedule or the reduction automatically taking out the restoration just ignores the notion that you either -- you either -- in AI -- in AIG FP's position, it either had to restore or it had to adopt a plan. But there is nothing in the reduction provision that prevents AIG, for example, extending out the lapse date, like they had an obligation to do. There's nothing in the reduction provision that prevents it from adopting a plan, like it had an obligation to do. And there was nothing in the reduction provision that prevented AIG from getting back to work to get the plan implemented. And if they say they could just walk away, that they can wind down, then we are -- we think that's a real breach of contract issue and it may be even a bigger breach of contract --

THE COURT: I understood.

ATTY. PERLSTEIN: -- prior. So moving past that, with respect to what Mr. Kiernan was saying about the funds provision and the bankruptcy provision, what I hear is that AIG FP is trying to draw all inferences in its favor on a motion to strike. Under AIG FP's reading, we have a greater

claim in a bankruptcy than we do out of a bankruptcy. We think the fair inference to be drawn, particularly on a motion to strike, is we have the exact same claim out of a bankruptcy that we do in a bankruptcy. And frankly, in my experience, it's very rare you get a bigger claim in bankruptcy than you do out of bankruptcy.

As to the notion of like that we had a claim, but as a practical matter, we have no discovery, to say that is an issue of fact that can't be decided on a motion to strike I think does not do justice to the facts surrounding that claim. I mean, for example, what we do know from AIG's papers is every other creditor of AIG FP was being paid. The only thing in front of my clients is the potential obligation to AIG. Whether that counts as a debt or a piece of credit that comes before or after my clients would be a real issue. Whether or not that should get subordinated because the improper acts of AIG effectively taking all of the business away from AIG FP would be a real fact issue. But to try to decide something like that as a matter of law on a motion to strike, we are well -- I don't want to belabor it, we're well outside of -- of the -- the facts that are alleged or what would be proper to consider on a motion to strike.

So I -- and like -- I'm happy to answer any

questions Your Honor has. But I think that sort of sums up the points that I wanted to make.

THE COURT: Okay. Thank you.

Anything further, Attorney Kiernan, before we move on to the third count? (Pause) Your -- your mic is muted, Attorney Kiernan.

ATTY. KIERNAN: Sorry. Thank you, Your Honor. Yeah, I'd -- I'd like to respond to some of the comments just made. You know, when -- when there's comments about how there -- the introduction of -- of information outside the record as to which discovery has to apply and how inferences of the complaint have to be drawn in plaintiff's favor, this is still a fact pleading jurisdiction. You now hear counsel talking about AIG concocting a scheme to cause AIG FP to have no profits, so that it wouldn't have to -- and so it wouldn't have to make any payments to executives. Putting aside that that is a wildly fantastic notion, that these plaintiffs know perfectly well doesn't correspond with the facts and the -- the -- the facts are that AIG FP was horrifically ruined in September of 2008 and left as an empty shell that needed the -- the loans for AIG to survive because it had no ability to make money on its own. And there -- this notion that there was -- that there was a -- a -- a -- an AIG determination by -- and by the way, AIG not being the -- the defendant

here, an AIG determination to wind down that was a cynical effort to avoid profits is not only fantastical, it also significantly is nowhere in the complaint, nowhere. So this is something that's being cut -- concocted in the course of an argument.

But that's not the way Connecticut law works. Connecticut law requires a plaintiff to plead facts supporting allegations. And the -- the -- the contention, well, we're -- we're just entitled to discovery on some of these imagined possibilities that could exist doesn't correspond with Connecticut law, doesn't correspond with plaintiff's own pleading obligations, Your Honor. So that first point I make.

Second, and -- and -- and let me talk a little bit about the plan because there -- the -- the first of all, there's a suggestion that a -- a plan isn't necessary if all you were doing was restoring in the -- in the context of -- of -- of years of profit. And -- and second, there's a notion that -- that the absence of a plan means that there was a breach. And I want to address both points. On the oblig- -- I -- I think it is necessary. I offered to do this and the Court said -- said you'd sort of defer and I don't blame you. But maybe I should take you through what happens in our conception in the year of -- of a profit under the restoration obligation. And so --

THE COURT: Well --

ATTY. KIERNAN: -- so suppose --

THE COURT: -- I'm limited to -- I'm going stop you there, Attorney Kiernan. I'm limited to the complaint. And --

ATTY. KIERNAN: Yes.

THE COURT: -- you're asking me to rule as a matter of law on the contract itself. So I -- I don't want to hear anything that's outside what's in the language in the contracts, deferred compensation plan, SIP, you point me to those sections, but any other information, the Court can't consider on a motion to strike. And --

ATTY. KIERNAN: Yes, Your Honor. And I appreciate that. What I was -- what I was going to go to is the operation of the contractual provisions under the reading of the contract.

THE COURT: Okay.

ATTY. KIERNAN: So -- so -- so suppose you've had a year of losses and you've reduced fund balances. And then, you have a year of gains. So let's suppose you -- you lost three hundred million dollars, you reduced fund balances, and then you have three hundred million dollars of gains. If you've -- there -- there -- when you have that, I've described it -- that as a restoration opportunity because there's no statement in that -- in the restoration provision that says you have to restore all of it as

fast as you can. It just says, you shall subsequently do it and subject to a plan.

Why would a plan be needed? Plan would be needed, Your Honor, because --

THE COURT: I'm sorry, counsel --

ATTY. KIERNAN: -- (indiscernible) --

THE COURT: -- I just lost your audio. Can you repeat --

ATTY. KIERNAN: Sorry.

THE COURT: -- that, please?

ATTY. KIERNAN: Do you have me now?

THE COURT: Yes.

ATTY. KIERNAN: Do you have me now, Judge?

THE COURT: Go ahead. Yes.

ATTY. KIERNAN: Okay. Why would a -- why would a plan be needed? Plan would be needed because if you have a year of gains, let's say you've got that three hundred million dollars of gains, you can use that entire three hundred million dollars to restore the fund balances of the year-one plan participants, who saw their balances reduced. But if you do, every dollar that you restore to those balances is an hour -- is dollar less of distributable income for this year's plan beneficiaries. And so you need to make a decision about whether you allocate a year in -- in a year of profits, whether you allocate the profits to restoring the past balances or paying -- paying the

current beneficiaries. That'd be entirely rational for AIG FP to say, well, what we're gonna do, since those are different people, is we've got a restoration obligation in years of profit, so -- but what we'll do is we'll make a plan that says, blank percent of each year's distributable income will go to restoring the past balances and the remainder will go to the existing folks. But there -- there a competing interest, 'cause those people are not the same and not in the same dollar amounts. And so, you need a plan to figure that out. And so you do need a plan under our view --

THE COURT: Oh, yes, and --

ATTY. KIERNAN: -- of restorations (indiscernible) --

THE COURT: -- the agreement provides for a plan.

ATTY. KIERNAN: Yes. Now, but -- but my point -- my point is it's particularly necessary, based on our contention that restoration takes place only in a year where there are no net losses. And -- and that that -- that that plan was necessary. Now, as to the absence of a plan and why they -- whether that's a breach, and this is something that the English Court of Appeal -- agreed with this on, was that the absence of a plan isn't a default when there was -- when it is a -- agreed that there was no obligation

to restore, absent a year of profitability, and there were no years of profitability. They -- the plan became sort of how do you plan when the contingencies that -- when the -- the -- when the contingency that would -- that gets you to -- to articulate a plan isn't happening?

So and -- and -- and if I might just say a word about the -- the French and the English decisions, you know, the -- of course, the biggest difference is that the French decision was made under French law and public policy, which set a particular rule. And the English decision was explicitly under Connecticut law, with the benefit of extensive expert testimony on Connecticut law. And we're not saying that you're bound by the Court's decision, Judge, but we are saying that that Court was able to interpret the contract on the strength of the contract on its own terms and on its own meaning and it explicitly rejected any need for extrinsic evidence. And we say that that could be done here, too, a little bit, and that the logic of that Court's decision is compelling.

Now, on the lapse provision, plaintiff still had -- if -- if -- if -- if -- if the -- the provision starts with a provision saying that if -- if balances aren't paid by 2013, the restoration obligation shall lapse. It is absolutely built into that -- that

provision, an assumption that it must be that that is -- happens because a -- a restoration is legitimately not paid. And -- and we've asked plaintiffs to give -- give us the scenario where -- where you would agree that restoration is legitimately not paid by 2013. And their answer is, well, it could've been extended thereafter. To which I say, you haven't answered the question. What is the scenario under which this lapse is legitimate, that you could legitimately not pay? And we say there's obviously a scenario, which is that in each year from now till 2013 that the -- a -- you have net losses, so that under the first sentence of 4.01B, you don't increase balances, you reduce them.

Now, as to the -- as to the obligation to extend, just a couple of points, Judge. First, you hear the plaintiffs characterize it as an obligation mandatorily to extend if you can. That's not what the provision said. It doesn't say that they -- they'll lapse on -- on December 31, 2013, unless they can be extended. It says, unless the company concludes that it may extend. Now, why would it use that qualified language? That -- that language has a meaning. And the lang- -- the meaning is not difficult to -- to discern, which is if you look at Section 4.09 of the DC -- of the DCP, now what you'll see -- the second to last provision. (Pause) It --

it -- it goes to the -- the -- this point that I made earlier that deferred compensation is also about making sure that -- that the employees aren't taxed until the -- the benefits are actually paid to them. So what you see in 4.09 is -- it is intended that amounts awarded or deferred under this plan will not be taxable under section 4.09A. And then it says, this plan shall be interpreted and administered to this extent possible in a manner that does not reach an -- a result in a plan failure, that it amounts to taxability. So with that -- with -- with that -- it's not hard to interpret these two provisions together. What that means is don't take chances, don't go near the risk of making all of this taxable. This is not something I'm -- take -- saying extrinsically. It's embedded in the agreement. And -- and so the -- the -- the language about unless the -- the company de- -- concludes that -- determines that it may amend, is plainly built in there to allow the company the discretion to make the judgment that it won't extend because there is a -- because there's a risk. Now, again --

THE COURT: I think their argument --

ATTY. KIERNAN: -- no allegations (indiscernible) --

THE COURT: -- though is was there a legal opinion on that, that extending would -- would make

it fail, or was nothing done?

ATTY. KIERNAN: Your -- Your Honor -- Your Honor, once as well, what -- what happened was there was a -- a -- communication to -- to -- to executives, which is the -- a exhibit I think is D or E to the complaint, saying the -- the company has determined that the -- that the obligations lapsed. What -- but what's lacking again is nothing in the complaint says that there was ever a determination by the board that it could extend. Nothing was -- in the complaint says that it could've been extended. There's an affirmative pleading obligation here and it's the -- it -- the -- there's an absence of allegations in the complaint on that issue. But in -- but ultimately, Judge, ultimately, it actually doesn't matter whether they lapsed or not because there also no allegations that there was ever a year between twenty nine -- 2013 and today, where AIG FP didn't have aggregate net losses. So that -- so the predicate for the -- the restoration, that you'd be out of aggregate losses and -- and have -- have profits has -- there's not alleged that that has ever occurred at any time.

ATTY. PERLSTEIN: Your Hon- -- may I briefly respond to --

ATTY. KIERNAN: Well --

ATTY. PERLSTEIN: -- those points, especially on

what we've alleged?

THE COURT: Yes.

ATTY. PERLSTEIN: So, Your Honor, we -- we have alleged these facts. We alleged in paragraph 122, by December 31st --

THE COURT: Sorry, Attorney Kiernan, if you could please mute your mic. Thank you. All right. Attorney Perlstein, what paragraphs of the complaint?

ATTY. PERLSTEIN: Sure. So if Your Honor looks at beginning on paragraph 122, we say, by December 31st, 2013, AIG FP should have restored and paid the DCA and SIP account balances. In paragraph 123, we go on to say, in fact, AIG FP could have restored as it was obligated to do under the plans, the DCA and SIP account balances, and repaid the plaintiffs from the general corporate funds or by borrowing from AIG under the bail out facility that was in place between AIG and AIG FP. The bailout facility was available to AIG FP for to meet all, quote, direct and legitimate business needs, end quote.

Then, as Mr. Kiernan makes reference to, we say, however, in a letter dated July 31st, 2014, AIG FP informed plaintiffs that it would not restore their DCA and SIP account balances, nor would it pay them the amounts it owed them under the DCP and SIP, and we cite to Exhibit D. In response to those

allegations, AI -- which would sustain our complaint and sustain our cause of action, AIG says, no, you misunderstand, we wound down, so we don't have an obligation to pay. That's outside of the complaint, but take -- taking those allegations as true, we've met our pleading obligation.

And again, Mr. Kiernan and AIG FP would read language into the agreement that just simply is not there. Looking at Section 1.04B and the restoration obligation, it says -- excuse me. All right. It says, AIG FP shall be obligated subsequently to restore amounts so deducted. Subsequently to restore amounts so deducted is subsequent to the reduction, you shall restore. It doesn't say anything about subsequent to having profits or subsequent to having distributable income. It's just subsequent to you -- subsequently to restore amounts. There's nothing about profits in the obligation to restore.

Similarly, on the provision about the board shall adopting a -- the board shall adopt a plan, it says literally just that, the board shall adopt a plan. It doesn't say, shall adopt a plan once you have profits or once there is distributable income. It just says, shall adopt a plan. The language that AIG FP relies on just is simply not in the agreement. And to come back to the question that Mr. Kiernan says that they asked the UK plaintiffs, and I think

he suggests they asked -- they asked us here on the lapse provision, what type of lapse could be a proper lapse? Whatever that is, that lapse isn't a -- the type where you don't do anything to try to kick out that date. In their letter, they didn't say, we looked to see if we could extend the date, but if we extend that date, even by a day or a month, we violate Section 409A of the tax code. That didn't happen.

If they actually would've been hard at work from 2008 to 2013 and said, you know, we tried to come up with a plan and it didn't work and now we can't extend it further, 'cause we'd be in trouble under 409A, again, on a motion to strike, I don't know if we would need to take their word on that. That's something we would be entitled to discovery on. But that's a possible scenario. But where they don't get back to work, they don't adopt a plan, and they don't extend the date, I think not only have we alleged a sufficient breach, I -- I think we're gonna be pretty good at trial, as well. But certainly, for a motion to strike, not -- meets our pleading obligations of have we alleged facts to sustain the claim.

So I think we've -- on -- well, let me pause there. I think we've answered the questions, but we think -- we agree. Look at the language of the plan and we think that language supports our reasonable

reading, which again, we don't need to show that our reading is better than Mr. Kiernan's right now. I think it is. We just need to show that our reading is reasonable. And I think we've done that.

THE COURT: All right. Let's move on to count three. (Pause) The breach of good faith and fair dealing. I don't have any questions with respect to that count. And I'll allow couns- -- I've read your brief, allow counsel to argue whatever you'd like to the Court further.

(Pause)

ATTY. KIERNAN: Who -- who would you like to hear from first, Your Honor?

THE COURT: I'd like to hear from you, Attorney Kiernan --

ATTY. KIERNAN: Okay.

THE COURT: -- (indiscernible).

ATTY. KIERNAN: So -- so the breach of the covenant of good faith and fair dealing starts, of course, with there is no -- it isn't a -- a -- an independent of the contract claim and it starts with, and you've got to have a breach of contract. And for all the reasons we've said, there's no breach of contract, there's no breach of the covenant of good faith and fair dealing. And that's -- that's our first and -- and fundamental point.

The second point is that the -- the foundation

for the breach of covenant of -- of -- of good faith and fair dealing is an allegation that has two components to it. One is that allegedly, AIG FP representatives repeatedly promised plaintiffs that -- that they would re- -- be -- be paid the full amount of their eliminated balances from that -- that were reduced to zero in the 2008 meltdown. And the second is that that induced plaintiffs to make deposits into the DCP accounts in reliance on those promises of payment.

Neither win -- one of those two provisions is sustainable under the complaint, Your Honor. If you look, they -- they collect a lot of statements in the complaint about a certain promises made. They start with public ones about how AIG has an obligation to pay it's -- it -- it -- what it's -- owes and it's -- I -- it has guaranteed amounts that it's agreed to pay. And as Your Honor indicated you understood in our earlier questions, those references were to the money that actually AIG FP did pay under the ERP, which came under enormous public criticism. That isn't about the money that they didn't pay. AIG felt it was really important to honor the -- at the payment obligations that it did have and it took enormous public hammering for honoring its contractual obligations. The difference here, of course, is that AIG contends that it didn't have to

pay the balances owed under the DCP. It paid the ERB benefits in -- and -- and went ahead and just took the hammering that it received on it.

The other statements that are quoted in the complaint, many of them are from -- there's one from a Mr. Shirley that happens eight months before the meltdown in September of 2008 and simply says that if somebody, if an SIP beneficiary, who has got some SIP money in the fund, leaves and therefore forfeits money, that'll go into the general fund and be distributed to people just as the 30 percent of distributable income will. That has nothing to do with a -- a -- paying account balances.

There's one statement by Mr. Dooley that is one sentence in a letter. They don't attach the letter, which, you know, it limits the -- the value of -- of what they say, in which Mr. Dooley says, we understand we have an obligation to take a look at a plan for repaying these benefits, but it doesn't make any promises or undertakings and (indiscernible), it was right after a catastrophic result, makes no assertions about what that will provide or that there will be a payment. So there's -- and if -- and if you -- if you look with appropriate rigor at the things that they quote from, not one of them is the promise that they say was made.

On the flip side of it, they say that statements

-- actions were taken in reliance on those statements. And you have to look at how payments were supposed to be made. If you look at the DCP, and you see -- in its -- in its provision about -- about payments made into the DCP, that they can be made in three ways. Under -- excuse me. Under 3.01, they -- there can be an automatic deferment.

(Pause)

THE COURT: Okay.

ATTY. KIERNAN: In which part- -- participants can have the por- -- portion of their bonus amount indicated on Schedule A deferred automatically. Under part B, they can have a -- a -- participate in the deferred compensation account, may voluntarily defer some of it. And under 3.04, there can be the additional return payment made to AIG FP executives.

Now plaintiffs don't allege and couldn't allege that there was a notional balance and it brought bonus amount or a -- a -- a distributable income available for deferral in -- in the year of the meltdown, 2008. Those were wiped out, Judge. And so there were -- there -- there wasn't -- there wasn't a mandatory contribution. If there had, a mandatory contribution wouldn't have been something that the employees were induced to do. And their 46 plaintiffs here, Judge, and the -- the plaintiffs haven't identified a single plaintiff, who allegedly

made a voluntary contribution to the account. So where's the action and reliance on the asserted promise?

So we've got no promise and no actual promise of -- of repayment of these deferred bonuses, they -- that were reduced to zero, and no -- no legally cognizable actions in reliance on them. And beyond that, Judge, a -- what you ultimately have is plaintiffs saying that it was a breach of the covenant of good faith and fair dealing for defendants not to have -- to have interpreted the contract in a way that said that they didn't have to pay the bonuses, the -- the deferred compensation accounts that had been wiped back to zero, it didn't have to restore them.

And -- and our submission in our -- in our -- in our brief, Your Honor, is that given the fact that a distinguished court of English judges has said that what AIG FP's conclusions were about its legal obligations were correct, the endorsement of those actions is correct by a court, even if -- even though not binding on you as a matter of collateral estoppel, precludes a claim that it could not -- it -- it -- AIG FP could not have held this position in good faith. If -- if the argument is at least valid enough to -- to get the approval of three distinguished appellate judges --

THE COURT: What authority --

ATTY. KIERNAN: -- (indiscernible) Connecticut law, who --

THE COURT: -- do you have that, that a foreign court's ruling precludes a litigant in Connecticut from asserting a claim on --

ATTY. KIERNAN: It's --

THE COURT: -- breach of good faith and fair dealing?

ATTY. KIERNAN: So -- so I'm not alleging that a -- that there is a collateral estoppel effect, Judge. What I'm alleging is that in order for a -- there -- and the -- the covenant of good faith and fair dealing claim to be sustainable, it -- it has to be demonstrated that the defendant could not have taken the position it took about the meaning of the contract in good faith.

And what I'm saying as a matter of intuition and logic, is that if the position it took was legitimate enough to gain the assent of a distinguished court anywhere in the world that was applying Connecticut law and thinking about it and looking hard at it, then that is incompatible with a conclusion that -- that that interpretation of the contract could not have been advanced in good faith.

(Pause)

THE COURT: Okay. Thank you.

Attorney Stamatopoulos.

ATTY. STAMATOPOULOS: Yes, Your Honor. So I'd like to start off on just treating that last point that Mr. Kiernan made, that intuition commands that you should find that because a UK Court found AIG FP's interpretation to be reasonable, then count three should not stand. Your Honor, the UK Court, in addition to being not binding, didn't really deal with any claim for a breach of the implied covenant of good faith and fair dealing. So I'll just leave it at that and move on to this -- to the next point.

You heard from Mr. Kiernan earlier in addressing the breach of contract that it's absolutely fantastical that AIG FP acted cynically, and in any event, there's nothing in the --

THE COURT: Just one second. Attorney Kiernan, could you please mute your mic?

ATTY. KIERNAN: My apologies again, Your Honor.

THE COURT: Thank you.

ATTY. STAMATOPOULOS: So you heard -- you heard from Mr. Kiernan, Your Honor, in addressing the breach of contract claims that it's absolutely fan-- -- and I'm not quoting word for word, but that it's fantastical that AIG FP acted cynically and -- and that in any event, the complaint does not plead allegations to that effect. Well, I'll turn Your Honor's attention, paragraph 177 in the complaint,

where it says, AIG FP breached the covenant of good faith and fair dealing implied in the DCP and the SIP by: A, unreasonably failing to pay the plaintiffs their earned compensation; B, acting in its own self-interest, as well as in the interests of its parent corporation, AIG, by taking money owed to our clients and using it as capital to fund AIG FP's business; C, acting in bad faith by repeatedly assuring the plaintiffs that they would receive the money they were owed; D, acting unreasonably and in bad faith by pressuring the plaintiffs, Your Honor, to return compensation, they were right -- they had rightfully earned for AIG and AIG FP's benefit; and E, Your Honor, threatening the plaintiffs, who did not volunteer to return their compensation and saying they would release their names to the public.

Your Honor, A, B, C, D, and E raise at the very least issues of fact that discovery, including deposition testimony from our clients, will show that AIG FP acted in bad faith. But setting that issue aside, the issue here is not whether our clients, Your Honor, acted in reliance to AIG FP's statements, that it would repay the amounts they were owed. That's in the contracts, Your Honor. The issue here really is whether AIG FP applied contract terms in a discretionary manner in bad faith to deprive our clients from the benefit of their bargain. And I can

list a number of ways in which AIG FP applied these terms in a discretionary fashion.

First of all, Your Honor, AIG FP gives you this automatic loop argument about how the reduction provision applies. Your Honor, that actually frustrates the very purpose of the contracts. And I will turn Your Honor's attention to the DCP at page 2 in the preamble. The DCP, Your Honor, the DCP talks about how the plan was intended to align the interests of plaintiffs and AIG FP and to promote the long-term success of the business. Now, it's important to note here, Your Honor, that the -- the DCP was entered into in 1995 and the -- and the -- the SIP was entered into once the financial crisis had already struck. We're talking essentially about the same agreement, the same bargain, because the repayment terms, as Mr. Perlstein already explained, are identical.

When plaintiffs, Your Honor, put the -- continued to put their money into SIP, they did not do so, so that a year or two later or in 2014, AIG FP could come back to them and say, you know what, we used your money and we've wound down our business, and now we continue to pay the creditors for AIG's benefit; but you know what, you're not getting your money back. The reason, Your Honor, our clients entered the DCFP and subsequently, the SIP, was

because they wanted to promote the long-term success of the business. That created an obligation, Your Honor. It created an obligation to at least try to continue to operate, to at least try to continue to generate profits. Short of that, Your Honor, that's not the only provision that AIG FP has interpreted in a discretionary way.

And in fact, Your Honor, AIG FP is really manufacturing discretion. There's nothing in the plans that allows it to apply these terms in the way it claims it had discretion to apply them. First of all, AIG FP had to unambiguously adopt a repayment plan. They didn't do that. Sure, it -- it could have sold assets. It could have gone into bankruptcy. Instead, it's staying in this limbo state, where it says, you know, you have this nominal -- it -- nominal right to your claim, but in reality, the way we've applied the contract by not entering bankruptcy, effectively, the economic realities are that you're not gonna get anything. That's -- that's the definition of abuse of discretion, Your Honor.

Moreover, with respect -- and this is the best example of a discretionary application of a term, in the lapse provision, it says that you shall -- that you -- that -- that AIG FP could amend the lapse dates, except if it determined that it may amend -- that it -- that it -- it -- it -- that it shall --

that the -- sorry, that the lapse, that the rights lapse on a date certain, except if AIG -- ex -- determ- -- AI -- AIG FP determines that it may amend the plan consistently with four nine A. That doesn't give AIG FP discretion not to amend the plans, Your Honor. If it may amend, pursuant to Section 409 -- 9A, then it -- then it -- then -- the -- the -- the lapse date, sorry, the rights shall not lapse. That's the meaning of that term. There's no dis- -- there's no discretionary element in that term, Your Honor.

I'll turn now to the statements that AIG FP and AIG's officials made. The premise of our claims, Your Honor, is not that, you know, our clients entered this deal when these statements are made. Our clients entered the deals with -- with AIG FP, including the DCP and the SIP, well before these statements are made. What is the relevance, you might ask, of these statements? The relevance of the statements is, Your Honor, and this is alleged in the complaint, the relevance of the statements is that when the financial crisis was under way, employee compensation at AIG FP and AIG were under intense public scrutiny. At the same time, AIG and AIG FP were negotiating a bailout. And eventually, they got about 85 billion dollars for that bailout.

When they were negotiating that deal, Your

Honor, people were asking questions. They were asking questions about how people like our clients here would get paid, whether they would get paid and whether that would be fair and appropriate, given the bailout. And so AIG FP started answering these questions. And you know what they said? They said, you will get paid. They made numerous statements to that effect, Your Honor. It was there --

THE COURT: And these are --

ATTY. STAMATOPOULOS: -- and it --

THE COURT: -- these are in -- allegations in your complaint?

ATTY. STAMATOPOULOS: They are in paragraphs 109, 111, 113, 115. I can walk you through them, Your Honor. And there's also --

THE COURT: That's all right.

ATTY. STAMATOPOULOS: -- and there's --

THE COURT: (Indiscernible.)

ATTY. STAMATOPOULOS: -- also a statement in 107, uh, sorry, an allegation in 107, paragraph 107. And I -- I will read that. Despite the difficult political climate, AIG's position was that its employees, including the plaintiffs, were entitled to and would receive the compensation they were owed in connection with work they had already performed. And in Octo- -- October 2008, a joint statement was issued from the New York Attorney General and AIG.

And Attorney General Cuomo said, these actions, referring to the actions that were taken in negotiating the bailout, are not intended to jeopardize the hard-earned compensation of the vast majority of AIG's employees, including retention and severance arrangements, who are essential to -- to rebuilding AIG and the economy of New York.

Now, if you want to parse out that language, Your Honor, I'll do that for you and I'll say, it doesn't say AIG FP, it says, AIG. Okay. The others -- there's other statements that refer to AIG FP. And it doesn't refer to the specific plans. But it's important to note here, Your Honor, that there are statements that were made. And if you look at the -- at the -- at the paragraphs I mentioned previously, you -- you'll see that there are express references to the SIP and the DCP.

But the -- the broader point is here, Your Honor, that these statements evidence an understanding of what the plans meant in 2008 and in 2009. And what the plans meant in 2008 and 2009, Your Honor, is that while people are asking questions, including AIG FP's employees, AIG FP is responding, you know what, don't worry, you're gonna get your money back. And why is that important? That's important because in 2014, that's Exhibit D to the complaint, AIG FP in July 2014 changed its tune.

It sent plaintiffs a letter saying, look, we've got big losses here, you're not gonna get your money back. There's no mention into a plan. There's no mention to deter- -- to a determination having been made about, you know, whether the lapse date could be pushed out. There's no mention of, you know, we've made our best efforts here to go back to work, just not getting your money back. A complete about-face, Your Honor. A complete reversal of course. This reversal of course, Your Honor, is textbook evidence, text, it's -- it's -- it's proof of bad faith.

The bad faith doesn't have to do with what AIG FP -- it -- it -- it's not in the inducement in 2008 to keep paying into the -- in -- into the plans. It's in the 2014 decision to send this letter saying, you won't get paid back. That is what our -- our allegations are here. And, Your Honor, we -- we -- we submit that these are -- are more than sufficient to support a -- a -- a bad faith claim. Thank you.

THE COURT: Okay.

ATTY. KIERNAN: Your --

THE COURT: Thank you.

ATTY. KIERNAN: -- Your Honor, may I respond? And --

THE COURT: Yes.

ATTY. KIERNAN: -- and by -- by the way, in responding, I want to thank Your Honor for taking us

at this time to hear us out so fully on this today.

THE COURT: You --

ATTY. KIERNAN: Two responses, first, it -- counsel is right, I didn't address one component of -- of their bad faith claim. That's the one where they alleged that -- that people who were paid out their ERP bonuses got pressured by executives to give portions of those bonuses back. That's something that -- that -- that's a factually accurate allegation, Your Honor.

THE COURT: That's in --

ATTY. KIERNAN: And that's one that we don't see.

THE COURT: -- paragraph 113, correct?

ATTY. KIERNAN: Yes. And that -- that's one -- that's one that defendants don't recede from at all. AIG was getting absolutely pillory because it has just been paid the 85 billion dollars out of taxpayer money, to rescue it at a time when the rest of the country was -- sat- -- facing significant distress and others were allowed to go bankrupt. And it was outrageous to the public that under the ERP guaranteed retention amounts that we talked about that hundreds of millions of dollars were paid out to AIG executives at the time when all this was taking place.

And so -- so it is true that AIG's CEO said to

those executives, give some of it back, this looks terrible. And -- and -- and I don't -- I don't know whether it's true, but even if assuming the truth of the allegation that he said, if you don't we're gonna give out your names. Your Honor undoubtedly remembers the picketing at the homes of these people in Connecticut because of so much public outrage. That was a completely defensible and appropriate action by AIG F -- FP to take in -- in all the circumstances. And many of the executives who had no contractual obligation to -- to give portions of their bonuses back did, in fact, give portions of their bonus back because they understood what the public appearance issue was. And -- and that -- that's one that I just -- where AIG I believe is happy to stand by -- by its conduct there is not reflecting bad faith.

On the -- the second point, Your Honor, is you asked, did you allege in the complaint that there were promises of payment? And he -- and counsel recited a number of paragraphs. And I'm afraid that means I'm gonna have to direct you to them, 'cause you'll see that not one of them involves a promise of repayment of the balances that were re- -- reduced to zero after -- after the -- the financial crisis. So he started with 107, in which paragraph 107 of the complaint says, AIG's position was that its

employees, including the plaintiff, were entitled to and would receive the compensation they were owed in connection with work they had already performed.

As we've already seen, Judge, you know, what happened was there was a DCP, when that wasn't gonna -- result in -- in any distributable income, the additur [sounded like] -- additur was an SIP that was designed to create as a -- as it says in its preamble, an opportunity for -- for additional compensation. When the SIP wasn't gonna work, they added into the ERP, which had a -- had the guaranteed retention awards. And those were paid. And AIG did take the public position that we were contractually bound to pay the ERP awards and we stood behind 'em. Where we have a contractual obligation to pay them, we'll pay them. AIG FP has never taken the contractual position that it was required to restore the balances that were reduced to -- to zero.

The next one was the -- the paragraph 109 provision, in which Mr. Dooley in October 2008, which is right in the center of this, the -- the -- where there -- the -- the -- everything's swirling. They quote only the sentence from his letter that says that the SIP and the DCP provide for the adoption of a plan for restoring these reductions. It does not say that the reductions will be restored. And it emphatically does not say that. That makes no

promise of a payment that way.

And paragraph 111 is a statement by Mr. Liddy, that's AIG, not AIG FP, explaining to -- to Timothy Geithner, who was then the -- the chairman of the New York Fed, but later became Treasury Secretary, I guess by then he'd become the Treasury Secretary, in the first quarter of 2008, prior management took significant retention steps at AIG FP, which guaranteed a minimum level of pay for both 2008 and 2009, as the complaint recognizes on paragraph 178. That's the guaranteed retention amounts of the ERP that they're talking about. And that they're talking about the promises that were made under the ERP.

And under 113, he said, it -- it says, a publicly available March 16th, 2009 letter -- says -- further confirmed that compensation plans, including the ERP, constituted clear contractual obligation on the part of FBA, which are guaranteed by AIG to pay guaranteed retention awards. The only -- the only commitments guaranteed by AIG and the only ones that referred to guaranteed retention awards are the ERP payments, Your Honor, not the restore -- restoration of the DCP balances. Again, that doesn't have anything to do with a promise to restore the balances to be restored to -- reduced to zero.

And the last one was paragraph 115, which refers to a January 21, 2008 e-mail. This -- this, for

starters, Judge, this was eight months before the catastrophe of September 2008. So it certainly wasn't about balances -- restoration of balances that were reduced after the September 2008 meltdown. And all it said is that the SIP provides that if there is a time when an employee who's -- leaves and there is a -- a -- a balance in the -- in the SIP that is created because they left and forfeited a balance under the SIP, that will be distributed to other employees. It has nothing to do with a promise of restoration of balances that were reduced to zero.

So I stand by my assertion that the answer to your question, do you allege in the complaint . . . individual instances where there are promises to repay the balances that were -- that were reduced to zero, the answer to that is no.

THE COURT: Thank you.

Counsel?

ATTY. STAMATOPOULOS: Your Honor, three points. First of all, we don't have to allege that AIG FP made public or oral or whatever have you promises to our clients. The promises were in the contracts. The relevance -- and that, by the way, that's not what I said. I didn't say that AIG FP promised unconditionally. That's not in the statements here. There was no promise of unconditional repayment in the statements. What we are saying, however, Your

Honor, is that this is evident from the contracts. AIG FP, who was under intense public scrutiny and was making statements concerning these contracts, never parsed out the ERP in those statements, never said, you know what, these don't concern the DCP and the SIP, this is just about the ERP.

They were making blanket statements, blanket assurances, high ranking officials, Your Honor. These were not some rogue employees talking to one another at cocktail party. They were making assurances to the public, to the employees, to the federal government in connection with borrowing 85 billion dollars. This was a serious issues. These were pressing questions. And what they said was blanket assurances, we will pay up, and by the way, in 115, and this is from January 2008, but I don't think there's any contention that January 2008 was a critical period in AIG's -- in AIG's finances from Mr. Sherling [phonetic], the SIP now provides that any amounts by which the SIP accounts are reduced pursuant to -- to the section will be available for distribution in 2013.

In -- in October 2008, this -- this paragraph 109, both the SIP -- this is in the heat of a crisis, Your Honor, both the SIP and the BCP provide for the adoption of a plan where (indiscernible) -- preferred compensation --

THE COURT: I -- I just lost your audio for a minute, counsel.

ATTY. STAMATOPOULOS: I apologize. If you read -- if you read paragraph 109, you'll see it's --

THE COURT: I have it in front of me right now.

ATTY. STAMATOPOULOS: That's a clear reference to both of these plans, okay. And it's -- it's in the heat of a crisis by Mr. William Dooley. Okay. So I think this is very clear evidence of what AIG FP thought of these plans in 2008 and it's in stark contrast with what it said about the plans in 2014.

Second, Your Honor, that's my first one. The second, Mr. Kiernan said that it was entirely reasonable for AIG FP to -- to ask its employees to return part of their compensation in view of the political climate. Well, as an initial matter, Your Honor, we respectfully disagree. We don't think it's reasonable to ask your employees to return anything. But that's not all the complaint alleges. The complaint alleges that there were threats of doxing AIG FP's employees if they refused. Threats, Your Honor. There's nothing reasonable about threatening your employees.

And third, Your Honor, the third I guess I covered in my first point, that these statements didn't concern the SIP and the BCP. Your Honor, like I said, we were not relying on these statements --

statements as -- as, you know, the basis for contract -- contractual claims. These are just -- this -- these statements are just evidence of the understanding. They're evidence of the cynicism with which AIG FP later on in 2014 changed its tune, changed its course, made an about-face, reneged on all of its contractual obligations, including adopting a plan, pushing -- pushing back dates, going into bankruptcy, all the things that Mr. Perlstein mentioned, and just said, you know what, we're not gonna pay you. So that's -- that's the essence of our claim.

THE COURT: All right. And the Court will certainly carefully examine the allegations in the claim to see whether or not it sufficiently supports a claim for breach of covenant of good faith and fair dealing.

ATTY. STAMATOPOULOS: Thank you, Your Honor.

THE COURT: All right. Is there anything else anyone would like to argue as we conclude here today?

ATTY. PERLSTEIN: I think we've covered the points we want to make, Your Honor, but thank you for your time. We very much appreciate it.

THE COURT: And you're very welcome. Thank you, all.

UNIDENTIFIABLE SPEAKER: Yeah, Your Honor, thank you so much for the time that -- that you gave to the

case today. We -- we do very much appreciate (indiscernible).

ATTY. KIERNAN: Your Honor, I -- I know we've -- I'm imposing on your patience. Could I just offer three more sentences?

THE COURT: Yes.

ATTY. KIERNAN: I -- I promise --

THE COURT: I -- I -- I'll ask --

ATTY. KIERNAN: -- I promise --

THE COURT: -- Attorney Perlstein to count the sentences. No.

ATTY. KIERNAN: They may have --

THE COURT: I -- I'm teasing.

ATTY. KIERNAN: -- they may have some semicolons (indiscernible) --

ATTY. PERLSTEIN: I'll do my best.

ATTY. KIERNAN: I've been -- I've been accused of write --

THE COURT: Go ahead, Attorney Kiernan.

ATTY. KIERNAN: -- a hundred-and-fifty-word sentences. (Pause) I'd -- I'd just strongly encourage the Court to give meaning to the reduction mechanism that was an important provision of the contract. The notion that the bankruptcy risk was the only risk involved is just not borne out in the statement of purposes, which was very purposeful about the importance of the reduction mechanism. And

plaintiff's reading reads the reduction mechanism, which was a very important provision, a risk allocation provision out of the contract. And that -- that -- and otherwise, I want to join everybody else in thanking the Court for its patience and for hearing us in such length.

THE COURT: You're very welcome. All right. Well, thank you. I'm going to reserve decision. I wish everyone good health until -- if -- if I see you again or I don't, until --

UNIDENTIFIABLE SPEAKER: I'm --

THE COURT: -- you receive a decision.

UNIDENTIFIABLE SPEAKER: -- well, be well, Your Honor.

UNIDENTIFIABLE SPEAKER: Thank you, Your Honor.

UNIDENTIFIABLE SPEAKER: Thank you, Your Honor.

UNIDENTIFIABLE SPEAKER: Take care.

THE COURT: Thank you.

*****

(End of excerpt; transcribed by C. Plavcan)

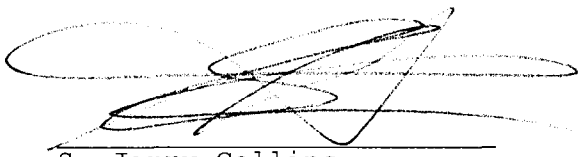
NO: FST-CV19-6046057S	:	SUPERIOR COURT
LEE ARTHURS, ET AL	:	JUDICIAL DISTRICT STAMFORD/NORWALK
v.	:	AT STAMFORD, CONNECTICUT
AIG FINANCIAL PRODUCTS CORP.	:	MARCH 5, 2021

C E R T I F I C A T I O N

(Pages 1 through 85)

I hereby certify the foregoing pages are a true and correct transcription of the audio recording of the above-referenced case, heard in Superior Court, G.A., Stamford, Connecticut, before the Honorable Sheila Ozalis, Judge, on the 5th day of March, 2021.

Dated this 8th day of March, 2021 in Stamford, Connecticut.



S. Jerry-Collins
Court Recording Monitor

NO: FST-CV19-6046057-S	:	SUPERIOR COURT
ARTHURS, LEE Et Al	:	JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	:	AT STAMFORD, CONNECTICUT
AIG FINANCIAL PRODUCTS CORP.	:	MARCH 5, 2021

E X C E R P T

C E R T I F I C A T I O N

I hereby certify the foregoing pages (86 through 155) are a true and correct transcription of the audio recording of the above-referenced case, heard via Teams in Superior Court, Judicial District of Stamford/Norwalk, Stamford, Connecticut, before the Honorable Sheila Ozalis, Judge, on the 5th day of March 2021.

Dated this 9th day of March 2021 in Stamford, Connecticut.

Catherine E. Plavcan
Court Recording Monitor

EXHIBIT D

Docket No. X08-FST-CV-19-6046057-S		
LEE ARTHURS, et al.,	:	SUPERIOR COURT JUDICIAL DISTRICT OF STAMFORD-NORWALK
Plaintiffs,	:	COMPLEX LITIGATION DOCKET
vs.	:	
AIG FINANCIAL PRODUCTS CORP., Defendant.	:	May 24, 2021

MEMORANDUM OF DECISION

MOTION TO STRIKE (Docket No. 115.00)

I.

PROCEDURAL BACKGROUND

The parties in this action are the plaintiffs, who are forty-six former high level executive employees who worked for defendant AIG Financial Products Corporation ("AIGFP") before, during, and after the financial crisis, and defendant AIGFP. The plaintiffs allege in this action that AIGFP has wrongfully refused to repay amounts that it borrowed from plaintiffs' deferred compensation accounts, which were established under two deferred compensation plans, The Deferred Compensation Plan (the "DCP") and the Special Incentive Plan (the "SIP") (collectively "the Plans"). The plaintiffs allege that while the Plans required the plaintiffs to defer payment of portions of their earned compensation, which AIGFP borrowed as working capital, the Plans also required AIGFP to repay the plaintiffs, with interest.

The defendant AIGFP filed a Motion to Strike the Complaint in its entirety on September 24, 2020. Counts One and Two of the Complaint assert breach of contract claims

relating to the DCP and SIP, respectively. Counts Three and Four of the Complaint assert claims for breach of the covenant of good faith and fair dealing and for a violation of General Statutes § 31-72, titled Civil Action to Collect Wage Claim, respectively.

The plaintiffs filed a memorandum in opposition to AIGFP's Motion to Strike on December 11, 2020, and AIGFP filed a reply brief on January 15, 2021. Oral argument was held on this Motion to Strike on March 5, 2021.

II.

FACTUAL BACKGROUND

The plaintiffs are 46 former high level executive employees who worked for AIGFP before, during and after the financial crisis of 2008. (Compl. ¶¶ 1-2.) While working for AIGFP, the plaintiffs participated in certain compensation plans. One such plan, the DCP required the plaintiffs to defer payments of their already-earned compensation into deferred compensation accounts held by AIGFP in the name of each participant (hereinafter "DCA"). (Compl. ¶¶ 2, 80, 84-89.) The DCP required the plaintiffs to defer portions of their already-earned compensation consisting of a mandatorily deferred portion of their Notional Bonus,[1] a voluntarily deferred portion of their Notional Bonus; and an additional portion of 30% of AIGFP's Distributable Income. (Compl. ¶¶ 87–89; Ex. A attached to the Complaint.) Section 4.01(b) of the DCP provided in relevant part: "The outstanding balance credited to the Deferred Compensation Accounts of each Participant and of AIG shall be subject to reduction, from time to time, to the extent of any losses incurred (i) by AIGFP . . . which losses . . . for any year in the aggregate exceed the outstanding market and credit reserves and current year income of AIGFP . . . but before base capital of AIGFP." (Ex. A attached to Compl. § 4.01 (b).) Section 4.01 (b) also

[1] A "Notional Bonus" is is defined for each participant as consisting of "a cash bonus amount that is paid currently and an amount of Deferred Compensation that is credited by AIGFP to the Participant's Deferred Compensation Account." (Compl. ¶ 87; Ex. A § 1.12.)

provided that "AIG Financial Products Corp. shall be obligated subsequently to restore amounts so deducted from Participants' and AIG's account balances, plus accrued interest . . . and, in connection therewith, the Board shall adopt a plan (which shall not be subject to the approval of AIG or the Participants) setting forth a schedule under which AIG Financial Products Corp. shall restore amounts deducted from Participants' and AIG's account balances (plus accrued interest thereon). Id.

Section 4.01 (b) also imposed a lapse date on AIGFP's obligation to restore plan balances, which AIGFP was obligated to change if it determined that it could do so without violating Internal Revenue Code Section 409A. Such section provided in relevant part: "Any such restoration plan shall provide that any restored amounts shall be paid in 2013; to the extent amounts have not been restored by December 31, 2013, all restoration rights shall permanently lapse except to the extent AIG Financial Products Corp. determines that it may amend the Plan to provide for payment of restored amounts without violating Internal Revenue Code Section 409A." (Ex. A attached to Compl. § 4.01 (b))

Section 4.01 (b) further provided that balances in the DCA accounts constituted unsecured debt. Section 4.01 (b) provided in relevant part: "Notwithstanding the terms of any such plan, in a bankruptcy or insolvency of AIG Financial Products Corp. each Participant . . . shall have an unsecured claim, subordinated and junior in payment and subject to the limitation on rights and interests to the extent provided in the immediately preceding subparagraph, against AIG Financial Products Corp. for the amount, if any, by which the balances credited to their Deferred Compensation Account were reduced and not subsequently restored (plus credit for accrued interest thereon), in addition to such claims as are described in the immediately preceding subparagraph." (Ex. A, attached to Compl. § 4.01 (b).)

In 2007, AIGFP and its parent company AIG, were reportedly on the brink of insolvency, with losses so severe that they overwhelmed not only reserves, but current year income, DCA balances and base capital. (Compl. ¶¶ 7, 102.) Pursuant to the DCP, AIGFP reduced the plaintiffs' DCA balances and borrowed plaintiffs' deferred DCP compensation, as part of AIGFP's efforts to cover its losses. (Compl. ¶ 8.) These catastrophic losses far exceeded the capital cushion and reserves created by the DCA balances, reducing those balances to zero. (Compl. ¶ 108.) In addition, AIGFP stopped paying plaintiffs' regular installments to which plaintiffs allege they were entitled to pursuant to the DCP, claiming that the DCA balances were negative. (Compl. ¶ 9.)

In January 2008, AIGFP and certain plaintiffs entered into the SIP, another deferred compensation plan for the benefit of particularly highly compensated executives (including 29 of the plaintiffs), whose 2007 bonuses were negatively impacted by mark-to-market valuation adjustments associated with AIGFP's super senior credit derivative business. (Compl. ¶¶ 99, 154–155, 158.) Under the SIP, the plaintiffs deferred payment of additional portions of their earned compensation. (Compl. ¶ 171.) The plaintiffs allege that AIGFP adopted the SIP to incentivize employees to continue working at AIGFP even after the financial meltdown had begun, particularly since several AIGFP employees had not received payments under the DCP plan in 2007. (Compl. ¶ 158; Ex. B attached to Complaint at 1.) The plaintiffs allege that the SIP provided that plaintiffs and others in their position would not receive compensation under the SIP if they resigned prior to January 1, 2009; and to receive a full bonus, plaintiffs would have to continue working for AIG or AIGFP until January 2, 2010. (Complaint ¶¶ 159–160; Ex. B attached to Compl. §§ 3.02 (a) & (b).) The SIP contains provisions identical to those in the DCP

relating to the reduction and restoration of balances. (Compl. ¶¶ 159-60, 167; Ex. B attached to Compl. § 4.01 (b).)

In total, AIGFP borrowed $185 million in already-earned compensation that plaintiffs deferred into their DCP and SIP accounts. (Compl. ¶ 19.) The plaintiffs allege that between 2008-2009, AIGFP repeatedly assured the plaintiffs that it would eventually repay them the amounts they were owed. (Compl. ¶¶ 109, 115, 116.)

The plaintiffs allege that in January 2008, AIGFP's General Counsel, William Shirley, in an email to all employees, stated that "[the SIP] now provides that any amounts by which SIP Accounts are reduced pursuant to Section 3.02 (a) or (b) (for example, where an employee resigns in 2008 or 2009) will be available for distribution to AIGFP employees in 2013 (in the same manner as, in addition to, the 30% portion of annual Distributable Income that is allocable to AIGFP employees that year)." (Compl. ¶ 115.) The plaintiffs also allege that in October 2008, AIGFP's CEO, William Dooley, assured AIGFP's employees that SIP and DCP balances would be restored as "[b]oth the SIP and DCP provide for the adoption of a plan for restoring these reductions to AIG and AIGFP participants' deferred compensation accounts." (Compl. ¶ 109.

In March 2008, AIGFP further adopted an Employee Retention Plan ("ERP") to provide retention incentives for employees during the fiscal crisis. (Compl. ¶¶ 179-89; Ex. C attached to the Complaint.) The ERP was established to provide incentives for AIGFP employees and consultants to continue developing, promoting and executing AIGFP's business. (Ex. C attached to the Complaint at 1.) The ERP provides for payment of certain bonuses immediately and unconditionally without regard to AIGFP's performance and contains a guaranty by AIG. (Ex. C

attached to Compl. §§ 3.01, 3.03, 3.05.) AIGFP paid the plaintiffs these guaranteed amounts in 2009 and 2010.

During this time period AIG, the parent company of AIGFP, negotiated the receipt of a $85 billion credit facility with the federal government (the "AIG Bailout") and, in turn, issued to AIGFP a revolving credit facility of $65 billion, formalized on the same day as the AIG Bailout on September 22, 2008. (Compl. ¶ 104.) The plaintiffs allege that this credit facility was at all times available to AIGFP for it to meet all direct and legitimate business needs. (Compl. ¶ 123.) The plaintiffs allege that by 2012, AIG had returned to profitability and repaid the amounts it owed to the federal government from the bailout, plus $20 billion in interest. (Compl. ¶ 12.) On July 31, 2014, AIGFP informed the plaintiffs that it would not restore the DCP or SIP Account Balances nor repay them the amounts it had borrowed from these Accounts, in excess of $185 million. (Compl. ¶¶ 14, 19.) AIGFP has never declared bankruptcy and is still a going concern. (Compl. ¶¶ 16, 125-126.) Notwithstanding the alleged assurances of a restoration of the Plans' balances, a restoration plan of the DCP and SIP balances was never adopted by AIGFP and the plaintiffs' reductions to their DCP and SIP deferred compensation accounts were not restored by the end of 2013.

III.

DISCUSSION

Pursuant to Practice Book § 10-39, "(a) [a] motion to strike shall be used whenever any party wishes to contest: (1) the legal sufficiency of the allegations of any complaint, counterclaim or cross claim, or of any one or more counts thereof, to state a claim upon which relief can be granted; or (2) the legal sufficiency of any prayer for relief in any such complaint,

counterclaim or cross complaint; or (3) the legal sufficiency of any such complaint, counterclaim or cross complaint, or any count thereof, because of the absence of any necessary party . . . ."

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "Practice Book . . . § 10-39, allows for a claim for relief to be stricken only if the relief sought could not be legally awarded." *Pamela B.* v. *Ment*, 244 Conn. 296, 325, 709 A.2d 1089 (1998). "[A] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court . . . . [The court] construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 398, 142 A.3d 227 (2016). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital,* 308 Conn. 338, 349, 63 A.3d 940 (2013).

A. Breach of Contract Counts One and Two

The defendant AIGFP first moves to strike Counts One and Two of plaintiffs' Complaint, which assert breach of contract claims as to the DCP and SIP, on the grounds that the plaintiffs rely on an unreasonable reading of the DCP and SIP that cannot be squared with the parties'

intentions as revealed by the DCP and SIP text. Defendant argues that the interpretation of the DCP and SIP terms present a question of law resolvable on a motion to strike. The plaintiffs contend that AIGFP breached the DCP and SIP by not adopting a restoration plan as required under the DCP and SIP and by not attempting to determine the feasibility of a restoration plan so that it could repay the plaintiffs as required by the Plans.

"The intent of the parties as expressed in a contract is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . [T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"[I]n construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous. . . . If a contract is unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 183, 2 A.3d 873 (2010). "[A]

contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, 273 Conn. 724, 735, 873 A.2d 898 (2005).

In support of its position that the interpretation of contract terms can be resolved as a matter of law by this Court on a motion to strike, the defendant cites to the *Association Resources* case. However, the interpretation of the terms of the employment agreement by the trial court in the *Association Resources* case was rendered after a bench trial, not on a motion to strike. Similarly, the decisions by the English High Court of Justice, and subsequently the English Court of Appeals, relating to the interpretation of the DCP and SIP, that both parties have relied on and directed this Court's attention to in support of and in opposition to this Motion to Strike, were rendered after a multi-day evidentiary hearing, with the majority of the testimony in that trial relating to the parties' intent with respect to the DCP and SIP Plans.

In this Motion to Strike, the Court is limited in its review to the allegations in the Complaint and the attached supporting exhibits containing the DCP and SIP Plans. The Court has reviewed the allegations contained in Counts One and Two of the Complaint and the language in the DCP and SIP Plans. This Court finds that the terms of the DCP and SIP relevant to this Motion to Strike are susceptible to more than one reasonable interpretation and the contract is ambiguous. This Court also finds after review of the allegations of Counts One and Two of the Complaint, that plaintiffs have sufficiently alleged a claim for breach of the DCP and

the SIP Plans. Accordingly, AIGFP's Motion to Strike Counts One and Two of the Complaint is denied.

B. Claim for Breach of Covenant of Good Faith and Fair Dealing

The defendant AIGFP has also moved to strike the claim asserted in Count Three of the Complaint, which asserts a claim for breach of the covenant of good faith and fair dealing. The defendant argues that such claim should be stricken as the Complaint does not state a claim that AIGFP applied a discretionary contract term in bad faith, thereby depriving plaintiffs of a reasonably expected benefit. Defendants contend that since AIGFP had no contractual obligation to pay out previously reduced account balances under Section 4.01 (b) of the DCP and SIP, plaintiffs cannot premise a good faith and fair dealing claim on the absence of restoration payments. (Def.'s Mem. Supp. Mot. Strike pp. 30-31.) The plaintiffs contend that AIGFP did not adopt a restoration plan or even attempt to determine the feasibility of a restoration plan so that it could repay the plaintiffs as required by the Plans. The plaintiffs contend that in every sense AIGFP has attempted to avoid the spirit of the bargain and violated the implied covenant of good faith and fair dealing by knowingly choosing to interpret the contracts unreasonably and reneging on its assurances that it would repay plaintiffs. The plaintiffs have alleged that AIGFP refused to repay the plaintiffs under the DCP and SIP, even though AIGFP systematically pressured plaintiffs to defer additional compensation after the financial crisis was underway, repeatedly assuring plaintiffs that it would honor its obligations to restore the balances taken. (Pl. Mem. Opp. Mot. Strike pp. 30-31.)

"[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the

benefits of the agreement. . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. . . . To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." (Internal quotation marks omitted.) *Renaissance Management Co.* v. *Connecticut Housing Finance Authority*, 281 Conn. 227, 240, 915 A.2d 290 (2007).

"Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *De La Concha of Hartford, Inc.* v. *Aetna Life Ins. Co.*, 269 Conn. 424, 433, 849 A.2d 382 (2004). "[B]ad faith may be overt or may consist of inaction," and it may include "evasion of the spirit of the bargain" (Internal quotation marks omitted.) *Elm Street Builders, Inc.* v. *Enterprise Park Condominium Assn., Inc.*, 63 Conn. App. 657, 667, 778 A.2d 237 (2001), quoting 2 Restatement (Second), Contracts § 205, comment (d) (1981).

The Court has reviewed the allegations of Count Three of the Complaint and finds that the plaintiffs have sufficiently alleged a claim for breach of the implied covenant of good faith and fair dealing. Accordingly, AIGFP's Motion to Strike Count Three of the Complaint is denied.

C. Claim Under Conn. Gen. Stat. § 31-72.

The defendant AIGFP has also moved to strike the claim asserted in Count Four of the Complaint, which asserts a claim for violation of General Statutes § 31-72, titled "Civil Action to Collect Wage Claim, et al". The defendant argues that such claim should be dismissed on the following grounds: (1) the bonuses at issue are not wages withing the statutory meaning, but are instead a form of profit sharing based on the success of the business as a whole; (2) AIGFP was not obligated to pay amounts in 2013, so there can be no wage claim for the failure to pay wages owed; (3) because the amount to be allocated to the overall bonus pool is not fixed, the portion of the amount allocated to each executive cannot be viewed as non-discretionary and purely mechanical measure of that executive's personal performance; and (4) plaintiffs have not pleaded bad faith, arbitrariness, or unreasonableness and therefore are not entitled to double damages or attorney's fees. (Def. Mem. Supp. Mot. Strike pp. 34-35.) The plaintiffs contend that: (1) AIGFP was obligated unconditionally to restore and pay the plaintiffs the amounts owed to them under the Plans; (2) that the deferred compensation was not profit sharing, but mandatory and voluntary deferrals that were extracted from plaintiffs' Notional Bonuses; (3) that such amounts were not discretionary or untethered to individual performance; and (4) that they have plead bad faith relating to defendant's refusal to repay the plaintiffs amounts it borrowed under the Plans.

Section 31-72 provides in relevant part: "[w]hen any employer fails to pay an employee wages in accordance with the provision of sections 31-71a to 31-71i, inclusive, or fails to compensate an employee in accordance with section 31-76k . . . such employee . . . shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court . . . ." Courts have interpreted "wages" to include

stock options and bonuses. See *Cook* v. *Alexander & Alexander of Connecticut, Inc.*, 40 Conn. Supp. 246, 248, 488 A. 2d 1295 (1985). Section 31-71a (3) defines wages as "compensation for labor services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation."

In *Weems* v. *Citigroup, Inc.*, 289 Conn. 769, 961 A.2d 349 (2008), the Supreme Court determined that the definition of wages in § 31-71a (3) was ambiguous as to whether a bonus, even one "discretionary or not specifically tied to identifiable extra work performed by an employee, could be considered compensation for labor or services rendered . . . ." (Internal quotation marks omitted.) Id., 779. It ultimately held that "bonuses that are awarded solely on a discretionary basis, and are not linked solely to the ascertainable efforts of the particular employee, are not wages under § 31-71a (3). Id., 782. In *Ziotas* v. *Reardon Law Firm, P.C.*, 296 Conn. 579, 997 A.2d 453 (2010), the Supreme Court held that the payment of a bonus that was contractually required, and only the amount of the bonus was discretionary, was not wages under § 31-71a (3). The Court held "such a bonus does not constitute wages under § 31-71a (3) . . . [because] the wording of the statute, in expressly linking earnings to an employee's labor or services personally rendered, contemplates a more direct relationship between an employee's own performance and the compensation to which that employee is entitled. Discretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship, falls outside the protection of the statute. . . . Although an employee may have a justified expectation of additional compensation when the employer is contractually obligated to give a bonus to the employee and any contractual conditions, such as the employer's annual profitability, are met, the relationship between performance and

compensation is still attenuated if the amount of the bonus is discretionary and dependant on factors other than the employee's performance." (Internal quotation marks omitted.) Id., 589.

However, in *Association Resources,* the Supreme Court distinguished its ruling in *Weems* from the facts present in that case, where a senior level executive was asserting a claim for a bonus under § 31-71a (3). It held that "[the] narrow reading of *Weems* does not recognize the nature of the plaintiff's employment as a senior level, executive manager of one of the defendant's divisions, with the bonus tied directly to the success of that specific division, rather than the performance of the defendant as a whole. Although the profitability of any business entity depends in no small part on the performance of that organization's employees, schedule 3.2 of the employment agreement, as well as the parties' testimony, demonstrates that the plaintiff was employed primarily to manage the Digital Group's employees and operations. . . . [T]o conclude that the bonus is not a wage because not every dollar earned by the Digital Group was directly attributable to the plaintiff's labors would be to ignore the realities of his executive-level managerial position, which was to be directly and solely responsible for the profitability of that division." (Emphasis omitted.) *Assn. Resources, Inc.* v. *Wall*, supra, 298 Conn. 177-79. The Supreme Court ultimately agreed with the trial court that the bonuses claimed were wages as defined by § 31-71a (3).

The plaintiffs claim that the amounts that they seek as "wages" are not discretionary and not untethered to individual performance. Plaintiffs also contend that the deferred compensation amounts, which included Notional Bonus amounts, credited to DCP participants and held in DCAs in the name of each participant, are wages that were already earned. (Compl. ¶¶ 86, 161). The Notional Bonus is defined for "each participant" as consisting of "a cash bonus amount that is paid currently and an amount of deferred compensation that is credited by AIGFP to the

Participant's Deferred Compensation Account." (Compl. ¶ 87; Ex. A § 1.12.) Plaintiffs also contend that the Notional Bonuses were tied to the services each of the plaintiffs performed on an individual basis and the Notional Bonuses were awarded to the plaintiffs on an individual basis. Thus, the plaintiffs argue that the wage payments they seek are not discretionary bonuses payable at the discretion of AIGFP, or hypothetical as they have already been paid a portion of their Notional Bonus, and the wages at issue are the portions of the Notional Bonus which was contributed to, along with the additional amounts attributable to AIGFP's distributions of 30% of its Distributable Income, to their respective DCAs. (Compl. ¶ 84.) Finally, plaintiffs contend that they have sufficiently pled that AIGFP acted unreasonably and in bad faith by refusing to repay plaintiffs the amounts it borrowed under the Plans, in violation of the Plans, and despite repeated promises of repayment.

The Court has reviewed the allegations contained in Count Four of the Complaint, which incorporates by reference the allegations set forth in Counts One, Two and Three of the Complaint, and the agreements attached to the Complaint, and this Court finds that the plaintiffs have sufficiently alleged a claim for wages due under Gen. Stat § 31-72 for purposes of this Motion to Strike. Accordingly, defendant AIGFP's Motion to Strike Count Four of the Complaint is denied.

III.

CONCLUSION

Based on the foregoing, the defendant AIGFP's Motion to Strike the claims asserted in Counts One, Two, Three and Four of the Complaint is denied.

BY THE COURT:

Ozalis, J.

OZALIS, J.

Decision entered in accordance with the foregoing 5/24/21. All counsel notified. [signature] - Court Officer