

**IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA  
CIVIL DIVISION**

NATIONAL ASSOCIATION OF	)	
STATE FARM AGENTS, INC.,	)	
	)	
Plaintiff,	)	C.A. No. 02ca0004089
	)	Calendar 7
vs.	)	Judge Neal E. Kravitz
	)	
STATE FARM MUTUAL	)	
AUTOMOBILE INSURANCE	)	
COMPANY, et al.,	)	
	)	
Defendants.	)	

**PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS IN  
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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Plaintiff National Association of State Farm Agents (“NASFA”), pursuant to Local Rules 12-I and 56, submits this statement of undisputed facts in support of its motion for partial summary judgment:

## I. PARTIES

1. NASFA is a District of Columbia corporation composed of State Farm Agents throughout the United States. NASFA’s principal place of business is in Baltimore, Maryland. *Complaint at ¶ 3; Defendants’ Statement of Undisputed Material Facts (hereinafter “Defs. Stmt.”) at ¶ 3.*

2. Defendant State Farm Mutual Automobile Insurance Company has its principal place of business in Bloomington, Illinois and is incorporated under the laws of the State of Illinois. *Complaint at ¶ 4; Answer at ¶ 4; Defs. Stmt. at ¶ 1 .*

3. Defendant State Farm General Insurance Company has its principal place of business in Bloomington, Illinois and is incorporated under the laws of the State of Illinois. *Complaint at ¶ 4; Answer at ¶ 4; Defs. Stmt. at ¶ 1 .*

4. Defendant State Farm Fire and Casualty Company has its principal place of business in Bloomington, Illinois and is incorporated under the laws of the State of Illinois. *Complaint at ¶ 4; Answer at ¶ 4; Defs. Stmt. at ¶ 1 .*

5. Defendant State Farm Life Insurance Company has its principal place of business in Bloomington, Illinois and is incorporated under the laws of the State of Illinois. *Complaint at ¶ 4; Answer at ¶ 4; Defs. Stmt. at ¶ 1 .*

6. The term “State Farm” shall be used throughout this document to refer to all Defendants.

## II. BACKGROUND

7. State Farm and each of NASFA's member Agents are parties to written agreements denominated the "AA3," the "AA4," or the "AA97" pursuant to which the Agents are appointed by State Farm to market its insurance products. *Affidavit of W. Michael Garner (hereinafter "Garner Aff."), Exs. 1-3; Defs. Stmt. at ¶ 8.*

8. The three forms of agreement were put into effect successively by State Farm in approximately 1977, 1982 and 1997. *Deposition of James Fisher (hereinafter "Fisher Depo.") at 183/12-18 (attached as "Garner Aff." Ex. 4); Defs. Stmt. at ¶ 9.*

9. As each new agreement went into effect, existing agents had the option to elect to become agents pursuant to the new agreements; new agents could sign up only on the new forms of agreement. *Defs. Stmt. at ¶¶ 13, 14.* These three agreements are substantially identical for purposes of this motion. *Defs. Stmt. at n.2.*

10. State Farm's Agents have always been the prime and principal vehicle of State Farm to sell insurance policies. *Fisher Depo. at 186/4-21, 97/5-7; Deposition of Vincent Trosino (hereinafter "Trosino Depo.") at 24/10-23 (attached as Garner Aff., Ex. 5); Defs. Stmt. at ¶ 7* ("State Farm provides insurance to the public principally through its network of approximately 16,000 Agents located throughout the states and provinces in which it does business").

11. State Farm Agents offer, sell, and distribute automobile insurance, fire (*i.e.*, homeowners') insurance, life insurance and health insurance, among other types of insurance. *Affidavit of David Swift (hereinafter "Swift Aff.") at ¶ 3; Trosino Depo. at 21/4-24.* Until 2001 there was a well established custom and practice that agents were to sell as much insurance as possible; this is what the Agent Agreement meant by requiring the Agents to make fulfillment of the agreement their full-time occupation; and accordingly, there was a corresponding

understanding and custom and practice on State Farm's part that it would make available to State Farm agents all of the products that they could sell. (*Swift Aff. at ¶ 4.*)

12. Agents are required to conduct field underwriting, solicit insurance, collect premiums and assist with insurance claims. *Garner Aff., Exs. 1-3 at ¶ I(A).*

13. Agents have protected territories. Agreement AA3 provides:

We will leave in your account all automobile policies credited to your account so long as the policyholder resides within a 25-mile radius of your principal place of business and within a state in which you are duly licensed, except that we may, after prior written notice to you, transfer any automobile policy to the account of another State Farm Agent when the policyholder makes a bona fide request in writing. You will respect the rights and interests of your fellow agents and policies credited to their accounts by refraining from writing or otherwise diverting policies from their accounts to your account.

*Garner Aff., Ex. 1 at ¶ I(H).*

14. The AA4 Agreement contains the same provision. *Id., Ex. 2 at ¶ I(H).*

15. Similarly, the AA97 Agreement provides:

We will leave in your account all policies credited to you account as long as the policyholder resides within a 75-mile radius of your principal place of business and within a state in which you are duly licensed, except that we may, after prior written notice to you, transfer any policy to the account of another State Farm Agent when the policyholder makes a bona fide request in writing. You will respect the rights and interests of your fellow agents and policies credited to their accounts by refraining from raiding or otherwise diverting policies from their accounts to your account. You shall neither directly nor indirectly attempt to divert policies to your account from unassigned accounts or from those of other State Farm Agents, or from your own account to the accounts of other State Farm Agents.

*Id., Ex. 3 at ¶ I(H) (emphasis added).*

16. Agents receive commissions for every policy they sell. *See Garner Aff., Exs. 1-2,*

*Section II; see also Garner Aff., Ex. 6.*

17. It takes years for Agents to build and establish their clientele and reputations within their communities. *Swift Aff. at ¶ 6; see also Garner Aff., Ex. 7 (setting forth, as of May of 2002, set-up expenses for a new agent of \$43,200 and one-time start-up expenses of \$18,300).*

18. Agents invest considerable time, effort, and resources into marketing, advertising, networking, record keeping, and selling State Farm insurance policies. *Swift Aff. at ¶¶ 4,6; see also Garner Aff., Ex.7.*

19. Prior to the advent of government regulation of franchising in the 1970's, State Farm openly referred to—indeed advocated—its Agents Agreements as a “franchise.” *Garner Aff., Ex. 8; Deposition of Charles Wright (hereinafter “Wright Depo.”) at 196/15-18 (attached as Garner Aff., Ex. 9).*

20. When the Federal Trade Commission and certain states began regulating the sale of franchises in the 1970's, State Farm directed its employees to stop using that nomenclature. *Garner Aff., Ex. 8 .*

21. State Farm made no substantive change in its arrangements with agents in light of this change of nomenclature. *Swift Aff. at ¶ 3.*

22. After this directive, State Farm recruiters continued to refer to a State Farm agency as a “franchise.” In inducing people to become agents, for example, State Farm recruiters compared it to a McDonald's franchise and stressed the advantages to agents of owing their own businesses under the supervision and protection of State Farm. Steven Knapp, a NASFA Board Member and State Farm Agent, testified:

I think I can say from day one that I always thought it to be a franchise. My manager talked about it. He made comparisons to a McDonald's or other similar, perhaps, more well-known types of

franchise organizations. You know, “you are going to be your own boss, you are an independent contractor, this is your franchise. I think the word “franchise” was even used as a comparable term. “You are getting a State Farm franchise.” I can almost hear him say the words.

*Deposition of Steve Knapp (hereinafter “Knapp Depo.”) at 103/18-104/5 (attached as Garner Aff., Ex. 11); Deposition of Stephen Adams (hereinafter “Adams Dep.”) at 91/4-17 (attached as Garner Aff., Ex. 12).*

22A. The State Farm Agent Agreements are terminable without cause. (*AA 3, 4, ¶ III-A; AA 97, ¶ III-A.*)

### **III. REQUIREMENTS TO BECOME A STATE FARM AGENT**

23. In order to become a State Farm agent (and insofar as is relevant to the Agent Agreement), an applicant must make certain payments to State Farm, which will be set forth in detail below.

24. Before becoming an independent contractor, agents are required to complete a two-year training program. *Swift Aff. at ¶ 7.*

25. During this period, agents operate pursuant to Trainee Agent agreements. *See, e.g., Garner Aff., Ex. 12-A (Exs. 10-17 to Deposition of Don Sikora).*

26. During this two-year training program, agents are supervised and trained by either a manager or an AFE (Area Field Executive) and are required to take several classes on how to sell insurance. *Deposition of Mary Bitzer (hereinafter “Bitzer Depo.”) at 43/5-9 (attached as Garner Aff., Ex. 13); see also Garner Aff., Ex. 14.*

27. During the training period, training agents are paid a certain “draw” by State Farm. *Swift Aff. at ¶ 8.* Trainee agents must then generate commissions sufficient to cover the draw that State Farm pays them. If agents do not generate commissions in this amount, they are

liable for the deficiency and must make it up to State Farm in order to become an independent contractor agent. *Id.*; *Deposition of John Killingsworth (hereinafter "Killingsworth Depo.") at 37/11-17 (attached as Garner Aff., Ex. 15).*

28. Trainee agents, though they do the same work as an independent contractor, receive commissions that are substantially reduced from what they would receive as an independent contractor. *Swift Aff. at ¶ 8.* For instance, the trainee agent agreements for the time period 1954-2004, reveal the following:

**Auto and Fire Commissions Earned by Trainees  
Compared to Commissions Earned by Independent Contractor Agents**

<b>Time Period</b>	<b>Personally Produced Auto</b>	<b>Assigned Auto</b>	<b>As Compared To ICA Commissions</b>	<b>Personally Produced Fire</b>	<b>First Year Assigned Fire</b>	<b>2<sup>nd</sup> Year Assigned Fire</b>	<b>As Compared To ICA Commissions</b>
1954-1985	0%	0%	10% - 7%	15%	0%	0%	15% - 10%
1985-1990	5%	0%	10%-7%	7.5%	0%	0%	15% - 10%
1990-1991	5%	0%	10% - 7%	7.5%	0%	0%	15% - 10%
1991 - 1995	5%	3.5%	10% - 7%	7.5%	0%	0%	15% - 10%
1995-2004	5%	0%	10% - 7%	7.5%	0%	0%	15% - 10%

*See, e.g., Garner Aff., Ex. 12-A.*

29. The trainee agents must forego all commissions on auto policies and give up a portion of their commissions on other types of policies such as homeowners or life insurance. *Killingsworth Depo. at 24/7-10, 14-18.* The forgone commissions exceed \$500 in any one year.

*(Swift Aff. at ¶ 8.)*

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30. Once the State Farm Agent becomes an independent contractor agent, he or she, as a practical matter, must purchase promotional items from State Farm, such as calendars, golf balls, cards, signs, stationery and other items. *Fisher Depo. at 191/7-17; 192/1-13; Swift Aff. at ¶ 10.* These are available only from State Farm, and State Farm makes it clear to agents that they should obtain such items for distribution to policyholders in order to fulfill their obligations as State Farm Agents. The cost of these items exceeds \$500 per year. *Swift Aff. at ¶ 10.*

31. In fact, training agents are provided with a list of start-up expenses, which include the purchase and installation of an exterior sign with an expected cost of \$1,300. *See Garner Aff., Ex. 7; see also Swift Aff. at ¶ 9.* As a matter of custom and practice, for no less than 35 years, State Farm has required agents to have signs. Indeed Agents cannot serve the interests of policyholders and the Company without a sign. As a practical necessity, State Farm has required agents to have signs. *Swift Aff. at ¶ 9.*

32. Agents generally spend in excess of \$500 on these items, which are necessary to promote their businesses. *Id. at ¶ 10.*

33. Additionally, agents must, as a matter of practical necessity, purchase sales brochures from State Farm, because State Farm prohibits agents from producing their own sales brochures. *Id. at ¶ 11; see also Garner Aff., Ex. 16.* These sales brochures summarize the benefits of the products that agents sell and agents typically spend at least \$25.00 per month on these brochures. *Swift Aff. at ¶ 11.*

34. Steven Knapp testified:

**Q.** Sales brochures, let's talk about that. You mentioned that too. Those are prepared by State Farm?

**A.** Yes, and I have to pay for those.

- Q. And are you obligated by State Farm to obtain those or –
- A. In reality, yes. As part of the sales process, you have to explain the benefits and coverages of a policy. Absent taking out a copy of the contract itself, which is very cumbersome and printed on very small paper, you would defer to a professionally prepared sales brochure which would highlight the major provisions of the contract. So if you are really going to sell product, you have to have access to something that provides those benefits.
- Q. You obviously feel that this is necessary for you to do your business.
- A. Yes.
- Q. And that's why you purchase them?
- A. Yes.
- Q. If you did not purchase them and decided to use something else of your own creation, State Farm would not say "you must purchase our sales brochures"?
- A. State Farm says that if I'm going to use sales brochures, I must purchase them from them.
- Q. But you are free not to use sales brochures? It may be a wise decision or not, but you are free to make the decision not to use sales brochures?
- A. I guess I would be free not to have running water in my office, but I choose to. To say that you don't have sales brochures in an insurances sales business, you just may as well throw away the applications too. It is hard to separate the sales brochure from the sales process. In fact, you can get in trouble with ethical problems if you don't disclose at least the basic items that are in the contract. You want to provide that information to the customer.
- Q. Could you take a sales brochure, look through it and make a list of things that you want to talk to the customer about?
- A. No, I couldn't do that. State Farm would prohibit me from doing that. We are admonished to not even take a

highlighter and highlight a sentence or a word on any of the illustrations that they provide us. That would be emphasizing one part of the contract or one part of the sales information as opposed to another. So we are not even allowed to do it. We are told we can't even write on the things. I can't circle something and write a little note and say "this is really important."

**Q.** You didn't let me finish my question. You said the sales brochure is important because there are items that you need to talk about to the customer when you explain the policy.

**A.** Yes, correct.

**Q.** It's possible for you to do that without the sales brochure itself, isn't it? You know what those items are now. You have been doing this for 20-some-odd years. You could make your own checklist of what things you feel you need to tell your customer. They would all be honest and accurate things. You don't need to look at the sales brochure to know what to tell the customer, do you?

**A.** Realistically it is not possible.

**Q.** Why not?

**A.** Realistically I could have walked from Belleville to here today. It is not practical to have done that. I flew on an airplane and got here in a timely manner. If you are conscientious about what you do, conscientious about what you tell your customers and wishing to limit liability for a customer coming back and saying "well, I didn't know that was in there" or "I didn't know that was available, you sold me this and you didn't tell me that this and this and this were available," no prudent agent in this day and age would ever not provide the information, the basic information about the policy. And the company wants us to do that, for all sorts of very good reasons.

**Q.** How much do you pay for the sales brochures?

**A.** I don't know. \$25, \$30 a month. It may not be that high. Some months it may be higher. It depends on what you order.

- Q. So you determine how many to order?
- A. Sure.
- Q. Is there one standard sales brochure or are there different sales brochures for different products?
- A. Not only are there different brochures for each product, sometimes there are several different versions of a brochure for each product.
- Q. So you make the determination of which brochures to order and how many?
- A. I make a determination from what's made available to me of that which to order. I can't make any changes.
- Q. I understand. These are brochures – you have already described them – prepared by State Farm?
- A. That's correct.
- Q. You feel they are necessary to you in order to operate your business?
- A. Absolutely, I feel that way.

*Knapp Depo. at 91/8-96/8.*

35. Until 1996, State Farm agents were required to lease computer equipment from State Farm. *Swift Aff. at ¶¶ 9 and 12.* Since 1996, State Farm has provided agents with a standard package of computer equipment. *Defs. Stmt. at ¶ 80.* Agents are specifically prohibited from attaching any of their own equipment to the equipment required to be purchased from State Farm. *Swift Aff. at ¶ 12.* Agents are also prohibited from installing any of their own software on computers required by State Farm. *Id.* Agents typically require more equipment and software than is provided by State Farm and thus must purchase or lease additional equipment themselves from State Farm. *Id.; Defs. Stmt. at ¶ 83.*

36. State Farm agents also must establish what are known as Premium Fund Accounts. *Garner Aff., Ex. 1-3, at ¶ 1(I)*. These accounts, required by contract, are bank accounts into which agents must deposit premiums that they collect from customers.

37. The funds belong to State Farm and the accounts are maintained solely for the benefit of State Farm, but the cost of maintaining them must be borne by the agents – a cost that can easily exceed \$500 over the course of the relationship. This was confirmed by J. Gregory Fisher:

**Q.** What is a premium fund account?

**A.** A premium fund account is an account that the agent, in essence, State Farm[,] opened in a local bank where the agent is, such that the end of each day, preferably, the agent can place either checks or moneys into this account written to State Farm to pay premiums or renewal premiums, or whatever, that State Farm can then deduct, at a certain point, electronically.

*Fisher Depo. at 73/2-10.*

\* \* \*

**Q.** Okay. Who pays the fees in connection with the premium funds accounts?

**A.** The agent does.

*Id. at 74/22-75/2; see also Swift Aff. at ¶ 13.*

38. Agents are required to pay monthly fees to maintain these accounts for the benefit of State Farm. NASFA Board Member Adams testified:

**A.** .... I have a premium – I assume we all have premium fund accounts where we deposit money that the customers bring in either to write insurance or to pay their bills, and it's a trust account in our name, but it's State Farm's money, and the majority of the agents in the country are charged a service fee just to hold that account open at each bank. I

mean, I know some agents who pay \$30 a month. I know several agents who pay \$70 a month....”

*Adams Depo. at 97/2-11.* NASFA President Swift testified similarly that it is a contractual requirement that agents, as trustees, pay the service charges on the premium fund account, and that monthly fees can be considerable:

**Q.** What are those fees, by the way?

**A.** Probably \$70, \$80 a month. They could be more. I mean, that’s my own personal fees. Some guys who do a lot of transactions, they could be in the hundreds of dollars a month, you know.

*Deposition of David W. Swift (hereinafter “Swift Depo.”) at 197/20-198/2 (attached as Garner Aff., Ex. 17).*

39. State Farm agents, in the course of selling insurance, must advertise as State Farm agents (as opposed to holding themselves out as independent agents); they must use State Farm forms; advertising must be done in accordance with State Farm procedures; and they must otherwise conduct themselves as State Farm agents. *Id. at ¶ 14; see also Garner Aff., Ex. 18.* The cost of this advertising exceeds \$500 per year. *Swift Aff. at ¶ 14.*

40. Agents are authorized to use, and in fact must use, the State Farm name and mark, and in fact do use its signs, stationery and advertising. *Swift Aff. at ¶ 14; see also Garner Aff., Ex. 19.*

#### **IV. THE SALE AND DISTRIBUTION OF INSURANCE**

41. State Farm Agents sell and distribute insurance. The Agents’ agreement provide that agents sell:

The Companies believe that agents operating as independent contractors are best able to provide the creative selling, professional counseling, and prompt and skillful service essential to the creation

of maintenance of successful multi-line companies and agencies.

*Garner Aff., Exs. 1-3 at Preamble.*

State Farm makes available to all agents the experience and technical knowledge acquired and developed over the years with respect to selling, underwriting and servicing insurance....We will invite you attend such meetings as may be called by the Companies for the purposes of...promoting sales....

*Id.*

42. James Gregory Fisher, State Farm's designated witness on the subject of insurance sales, testified that agents sell insurance and clients purchase it from them. *Fisher Depo. at 90/6-16; 91/19-22; 92/1-6; 93/6-11; 94/2-7.*

43. Additionally, Mr. Fisher stood by his previous deposition testimony regarding the fact that agents sell insurance as follows:

**Q.** Do you recall testifying in a case called "State Farm Mutual Automobile Insurance Company against John W. Weir"?

**A.** Yes.

**Q.** And do you recall that you were asked a question "so in a particular community, if they can't get the agent or agents in that community to actively market and sell a new set of products, they really don't have any way to push it forward in that community, do they?" And you gave the answer "assuming that the people who live in that community want to purchase insurance from that particular agent who is selling the products that would be right."

*Fisher Depo. at 91/15-92/6.*

\* \* \*

**Q.** Okay. And do you disagree with that testimony, in any respect today?

**A.** No.

**Q.** Do you recall testifying, in that case, that it's the agent that sells the product?

*Id. at 92/20-93/2.*

\* \* \*

**Q.** Okay, I'll show you a question and answer and see if it refreshes your recollection. The question was, "but in terms of who it is that actually meets the prospect and sells the product to the policy holder, that's the agent in the community; right? "Answer: Typically, yes."

*Id. at 93/5-11.*

\* \* \*

**Q.** So that was the answer that you gave under oath; is that right?

**A.** That's correct.

**Q.** Okay. And is there anything that was inaccurate or untruthful about that?

**A.** No.

*Id. at 93/21-94/7.*

44. John Killingsworth, a former State Farm employee who supervised agents, confirmed that agents sell:

**Q.** If I could ask you what the principle duty of the State Farm agent was when you were employed by State Farm, what would you—what would you say the principle duty was?

\* \* \*

**A.** Was to write and solicit business.

**Q.** Okay. When you say write business, what do you mean by that?

**A.** Sell policies.

*Killingsworth Depo. 42/11-14; 22-25; 43/1.*

45. State Farm requires numerous training programs that explicitly teach agents how to sell insurance. *Bitzer Depo. at 43/5-9.*

46. For instance, the agents are required to take a class entitled “Client Centered Selling.” *Swift Aff. at ¶ 7; see also Garner Aff., Ex. 13-A.* This class taught agents a concept referred to by State Farm as the “Need Satisfaction Selling Process.” *Id.*

47. State Farm has an expense reimbursement policy for trainee agents. State Farms’ stated purpose of the policy is:

Expense reimbursement attempts to put all Trainee Agents on a level playing field. This reduces their financial worries and allows them to concentrate on what they were selected to do: sell State Farm products and services to meet customer needs and operate profitable, multi-line agencies.

*Garner Aff., Ex. 20 (emphasis added).*

48. State Farm has published a magazine for its agents entitled “The Reflector.” In that magazine, State Farm, and particularly its Vice President for Agency Charles Wright, repeatedly refers to State Farm agents “selling” insurance. As recently as January 2004, Chuck Wright, in an article capturing a discussion between Chuck Wright and Ed Rust , State Farm, said:

With more than 70 products for agents to sell, its no longer possible for one person to have his or her arms around all of them.

\* \* \*

Selling insurance and financial services, products through agents is the way we do business and what makes us distinctly different in the marketplace.

*Garner Aff., Ex. 21 (emphasis added).*

49. In a January 2001 article in “The Reflector,” Chuck Wright states that  
It takes the agent to stimulate sales.

\* \* \*

Since we put agents on board in Connecticut, thousands of Homeowners’ applications have been written and millions of dollars in life sales have been made by agents talking with customers about their needs and asking them to buy.

*Garner Aff., Ex. 25-A.*

50. In a March 2001 article, Chuck Wright tells the agents, “You are still the greatest sales force anywhere.” *Garner Aff., Ex. 22.*

51. In May 2004, Chuck Wright, in an article entitled “A Trio of Advancements,” opens with the statement to the agents that “Our partners in technology are hard at work on many projects that will make it easier for you to sell, service and prospect for our 72 products.”  
*Garner Aff., Ex. 23.*

52. A one-page article, authored by Chuck Wright, in the August 2003 issue states:

- Buy State Farm Long-Term Care Insurance yourself. You aren’t going to sell much of any product you don’t believe in enough to carry yourself.”
- Develop and practice your sales interview strategy.”
- Don’t give up if you don’t make a sale to your first prospects.”

*See Garner Aff., Ex. 24 (emphasis added).*

53. The article goes on to say that “The Agents Staff 2000 Program is designed to upgrade staff professionalism in both services and sales, helping agents find exceptional people and provide tools for them to train and manage them better.” *Id.*

54. Chairman Ed Rust, in a January 1999 article in “The Reflector,” said that “More and more agents are completing the steps necessary to sell these registered products.” *Garner*

*Aff., Ex. 25 (emphasis added).*

55. The headline of an article in “The Reflector,” dated September of 1999, written by Chuck Wright, reads “AGENTS HOOK SALES FROM INTERNET LEADS.” *Garner Aff., Ex. 26.*

56. Another article in “The Reflector,” authored by Chuck Wright, in February of 1999, discusses improvements available to agents, and speaks of the “Business Management and Sales Process” or BMSP. The article states that the BMSP will allow agents to “[s]ell via a structured sales process.” *Garner Aff., Ex. 26-A.*

57. An IRS document produced by State Farm, which is sent in response to information supplied to the IRS by State Farm, repeatedly states that State Farm agents sell State Farm products:

He (the worker) receives training from your firm via product and sales seminars, continuing education, and motivational seminars. Your firm offers him training dealing with a range of topics such as sales, service, ethics, and market conduct.

\* \* \*

You concur that he is required to meet the terms and conditions of sale...

\* \* \*

You concur that where he sells your firm’s products are at his discretion, *i.e.*, his office or at customer locations.

\* \* \*

You concur that he sells and distributes your firm’s insurance and financial products and services, *i.e.*, property, casualty, life and health insurance, and its bank products consisting of variable life/annuities and mutual funds.

\* \* \*

You concur that he sells other types of insurance for your firm.

*Garner Aff., Ex. 27 (emphasis added).*

58. When a State Farm agent is contacted by an applicant for insurance, the agent has the authority to close the sale of that insurance because a State Farm agent has the authority to bind coverage – *i.e.*, a customer may come to the agent’s office, complete an application and pay a premium and receive coverage on the spot. *See Garner Aff., Ex. 27-A.* This was confirmed by Vincent Trosino, President, Chief Operating Officer for State Farm Insurance Companies, as follows:

- Q. Do you know what—Do you know what the term “binder” means?
- A. I’m generally familiar with that yes.
- Q. What does it mean?
- A. It means a temporary commitment by State Farm to—Let’s take auto insurance as an example—
- Q. Mm-hmm.
- A. --if that’s okay—temporary commitment for a limited period of time that we would way we would stand behind coverage for that person as we consider the application for acceptance and sale.
- Q. Okay. Is a binder issued at—at some point?
- A. I believe it is.
- Q. Okay. At what point in the process is that binder used?
- A. I believe at the point of application.
- Q. Okay. Now, what—what—At the point of application what contact does the applicant have with State Farm itself?
- A. their contact I with a State Farm independent contractor agent who we have a contract with to—to handle that kind of process.

**Q.** Okay. And so the—the independent agent is authorized at this point to bind the coverage?

**A.** Unless there's been some reason to take away the binding authority of that agent—

**Q.** Mm-hmm.

**A.** --yes.

*Trosino Depo. at 90/3-14; 92/25-93/12.*

59. While State Farm has broad underwriting guidelines to assist agents, if an applicant for insurance otherwise meets the guidelines, the agent may complete an application and “bind” the coverage at the time of application and payment of the first premium.<sup>1</sup> *Wright Depo. 23/1-10; Fisher Depo. at 133/11-22; 134/1-5.* State Farm Director of Underwriting, Barry Thomas, confirmed:

**Q.** Well, at what point, in your view, does State Farm become contractually committed to provide coverage to a person or entity?

**A.** When the company has made the decision to accept or reject the requested coverage for – requested application for coverage.

**Q.** Okay. And, and that's after – that's sometime after a binder is issued; is that correct?

MR. REICHLER: Well –

**A.** No. The company has – the company has accepted the coverage when the binder is issued on an interim basis.

*Deposition of Barry Thomas (hereinafter “Thomas Depo.”) at 61/12-62/2.*

60. Once coverage is “bound,” State Farm is obligated to assume the risk of loss to

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<sup>1</sup>The underwriting guidelines are very broad; for example, an agent would not bind a policy for an applicant who appeared to be inebriated or who had a criminal record.

the extent of coverage. *Wright Depo. at 23/1-10*. State Farm subsequently reviews the policy application and may decline coverage and not issue a policy, but until it does, the applicant is insured. *Id.*

61. Apart from selling insurance, however, State Farm agents, consistent with the terms of the Agent Agreement, in fact deliver, distribute, market and dispense insurance policies to their clients. *Swift Aff. at ¶ 5*.

## V. THE AGENT AGREEMENT

62. The Agent Agreement contains a number of provisions that are relevant to this motion and should be highlighted in this statement of undisputed facts.

63. The preamble stresses that the purpose of the Agreement is to, among other things, “increase business on a profitable basis.” *Garner Aff., Exs. 1 - 3 at Preamble*. “It is to our mutual interest to serve the insuring public, to comply with all applicable laws, to increase business on a profitable basis, and to maintain the Companies’ financial strength to protect policyholders’ interests.”

64. The Agreements recognize that the agents are independent contractors, and that the Company does not assert control over their daily activities:

The Companies’ agents operating as independent contractors, within the scope of their authority, are best able to provide the creative selling, professional counseling, and prompt and skillful service essential to the creation and maintenance of successful multiple-line Companies and agencies. We do not seek, and will not assert, control of your daily activities, but expect you to exercise your own judgment as to the time, place, and manner of soliciting insurance, servicing policyholders, and otherwise carrying out the provisions of this Agreement.

*Id. at Preamble*.

65. The Company agrees to provide guidance and states that it will invite agents to

attend meetings:

State Farm makes available to all agents the experience and technical knowledge acquired and developed over the years with respect to selling, underwriting, and servicing insurance. We will provide you, through our personnel, with information and guidance as to the operation, conduct, and financial management of your agency; and from time to time we will designate specific employees to advise you regarding your activities. In turn, we will invite you to attend meetings for the purpose of introducing new products, ideas, services and procedures, promoting sales, and furnishing you with assistance, guidance, and consultation.

*Id. at Preamble.*

66. The agents' duties are described in broad terms:

The Agent will solicit applications for insurance, collect premiums, fees and charges, countersign and deliver policies, reinstate and transfer insurance, assist policyholders and cooperate with adjusters in reporting and handling claims, avoid conflicts of interest, comply with all laws and regulations, and cooperate with and advance the interests of the Companies, the agents, and the policyholders.

*Id. at Section I.A.*

67. While the agent is obligated to follow procedures, the agreement reiterates that he is an independent contractor "for all purposes" with "full control" of daily activities.

As a State Farm agent, you are obliged to follow State Farm procedures and processes and to provide prompt, friendly, accurate, and cost effective service. You are an independent contractor for all purposes. You have full control of your daily activities, with the right to exercise independent judgment as to time, place, and manner of soliciting insurance, servicing policyholders, and otherwise carrying out the provisions of this Agreement.

*Id. at Section I.B.*

68. The Agreement further recognizes that agents have exclusive territories:

You agree that in the location or relocation of your office you will

not unduly infringe on the established office locations of any other agent.

*Id. at Section I.E.*

69. State Farm maintains control over its advertising, name and trademark:

We will advertise, provide promotional materials, and participate in the cost of your advertising, in accordance with policies determined from time to time by us. You will not use any advertisements referring to us or identifying us, directly or indirectly, without our prior approval.

*Id. at Section I.F.*

70. The Agreement also states that while the agent will not directly or indirectly write insurance for another company, State Farm may authorize the agent to do so:

The fulfillment of this Agreement will be your principal occupation and requires your personal services, and you will not directly or indirectly write or service insurance for any other company, other than a State Farm subsidiary or affiliate or through any governmental or insurance industry plan or facility, or for any agent or broker, except in accordance with the terms of any written consent we may give you.

*Id. at Section I.G.*

71. The agent must collect premiums on behalf of the company and deposit them into a premium fund account that it must pay to maintain “for State Farm’s benefit”. *Id. at Section I.I.*

72. State Farm retains the right to prescribe policy forms and provisions and other procedures:

We retain the right to prescribe: all policy forms and provisions; premiums, fees, and charges for insurance and services; rules governing the binding, acceptance, renewal rejection, or cancellation of risks, and adjustment and payment of losses; and limitations on the submissions of applications by individual agent, by market area, by line of coverage, by policy type, by Company,

or by other means.

*Id. at Section I.L.*

73. Significantly, in the AA3 and AA4 forms of Agreement, the last clause, purporting to give the company the right to prescribe limitations on the submission of applications, does not appear. *Garner Aff., Exs. 1, 2.*

74. State Farm purports to retain the right to control agent compensation:

Each Company reserves the right to fix and determine the amount, extent, and conditions of any bonuses, awards, prizes, and allowances.

*Garner, Aff., Exs. 1-3.*

75. The Agreement provides that it will terminate upon the death of the agent or upon notice:

This Agreement will terminate upon your death. Either you or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address.

*Id. at Section III.A.*

76. However, upon termination, an agent is entitled to a termination review:

In the event we terminate this Agreement, you are entitled upon request to a review in accordance with the termination review procedures approved by the Boards of Directors of the Companies, as amended from time to time.

*Id. at Section III.B.*

77. With respect to this provision, State Farm's designated witness with knowledge, Gregory Fisher, testified that State Farm never terminates anyone arbitrarily or capriciously; it always does so for a reason. *Fisher Depo. at 15/10-14; 16/16-19.* In other words, State Farm terminates only for cause.

## VI. STATE FARM'S WRONGDOING

Over the past several years, State Farm has engaged in or implemented a number of practices. These include the following:

### A. Partnering Program

78. Some years ago State Farm decided to go into the business of selling mutual funds and other financial products. *Swift Aff. at ¶ 15*. Under NASD regulations, people who sell mutual funds must be licensed to do so, and State Farm embarked upon a campaign to have its insurance agents obtain licenses to sell mutual funds. *Id.*

79. While many agents became so qualified, a substantial number – about 40% – did not. *Id. at ¶ 15; Garner Aff., Ex. 29; see also Defs. Stmt. at ¶ 107*.

80. In order to attempt to market such products to customers of agents who were not licensed to sell them, State Farm implemented a “partnering” program under which a non-registered agent was paired with a registered agent to whom the non-registered agent could refer inquiries from persons interested in buying mutual funds. *Id. at ¶ 16; see also Garner Aff., Ex. 30; Defs. Stmt. at ¶ 109*.

81. John Killingsworth, an employee of State Farm for nearly twenty-five years, serving as both an Agency Field Manager and an Agency Field Executive, (*Killingsworth Depo. at 33/4-35/22, 39/18-42/10, 43/23-51/14*). Mr. Killingsworth also pastured churches in Arizona and New Mexico. *Id. at 10/14-14/12*. He described the Partner-Agent program as follows:

**Q.** Are you familiar with something called the partner agent program?

**A.** Yes.

**Q.** Can you describe what that is, please?

- A. Agents that would not or did not get their securities licenses were asked to select or were given a partner agent that was securities-licensed. The lion's share of those agents – and it was my experience that all of them, in my particular case, were new agents with little or no book – and the partnering agent was to refer anybody that had a securities policy that they wanted to buy to the partnering agent that had the securities license.
- Q. How is it that State Farm agents – Well, strike that. How did you – If you did, how did you present the partner agent program to the agents under your jurisdiction?
- A. I resisted it.
- Q. Why?
- A. The vice president that I had had already selected the agents. They were all trainee agents. And they were to be assigned to these large agents who had these large books of business, very lucrative, very wealthy clients. If the senior agent was not going to get the securities license, they were – the VP was very, very adamant that we are going to write these security products on our clients. They're going to get a chance for them. And they will be referred to this list of trainee agents.

*Killingsworth Depo. at 72/15-73/19.*

Killingsworth testified as to his reaction to the program in light of his responsibilities to the agents in his geographic area:

BY THE WITNESS:

- A. At the time it was announced, I had a very visceral reaction to it, because it is impossible for an agent to advise a client on a financial services product without knowing all of the business that agent has. The high propensity of those agents, of the new agents, becoming the agent for the existing book of business was extremely high. Very deep concern with me. One of my responsibilities, relationships with agents. Agents with large books of business being diminished in this way was very troublesome for me.

BY MR. HILLMAN:

Q. Did you express that view to anyone in State Farm management?

A. Yes. To Mike Dannewitz.

Q. And who was Mike Dannewitz?

A. He was my agency vice president.

Q. What, if anything, did Mr. Dannewitz say in response to that?

A. We have got to meet the corporate objectives. WE have got to become a financial services organization. These agents chose not to go with us. We have to go without them.

*Killingsworth Depo. at 79/2-23.*

82. Although it was held out as a voluntary program, non-registered agents had no choice but be paired with a partner agent. First, non-registered agents were asked to select or name a partner agent. That nominee had to be approved by the agent's AFE (Area Field Executive). If the non-registered agent refused to nominate a partner, or if the AFE refused to approve of the nominee, then State Farm selected a partner agent for the non-registered partner. Don Sikora, an Executive Administrative Assistant for State Farm, confirmed this, stating that:

Choosing not to become registered, they'll be given the chance to nominate a local select registered agent for securities marketing, sales and service of their current customers, thus providing them with some involvement in this process and products and as an extension of their service to their customers. However, if they should choose not to nominate a partnering agent, the company will appoint a select registered agent for marketing and sales within the non registered agent's customer base.

*Garner Aff., Ex. 30.*

83. This is confirmed by State Farm's own Partner Agent Program document, which

states:

If a non-registered agent chooses not to nominate a fellow State Farm agent to be his or her partner, the AFE will be asked to select an agent that will function as the non-registered agent's partner.

*Garner Aff., Ex. 31.*

84. State Farm maintains a "Registered Representative Data Base," which State Farm uses to locate a registered representative if a customer should call State Farm directly, and to refer the customer to the registered agent directly. *Deposition of Don Sikora (hereinafter "Sikora Depo.") at 16/16-24 (attached as Garner Aff., Ex. 31-A); see also Garner Aff., Ex. 32.*

85. This would, in turn, require the non-registered agent to share the identities and key personal and financial information about clients with the registered agents. *Id. at ¶ 16.*

86. State Farm claimed that the sale of mutual funds and the Partnering Program were justified by customer demand. *Fisher Depo. at 176/1-13.*

87. In fact, State Farm conducted no studies that showed its customers were demanding to buy mutual funds from it, *Wright Depo. at 34/4-21*, and in fact the only study done on the Partnering Program showed that customers were not interested in dealing with State Farm agents other than their own agents. *Garner Aff., Exs. 33, 34.*

88. Non-registered agents were and are understandably concerned that registered agents would, upon receiving these referrals, "raid" their books of business or result in other less-than-ethical business practices, resulting in a loss to the non-registered agents. As Board Member Stephen Adams testified:

A. .... So I felt like if they did that and someone decided finally to buy one of the mutual funds or a variable life product and they went to that partnering agent, they would just on their own want to gravitate all their business to that one place, because they are paying me money to cover

them for insurance. With this agent over here, if the stock market goes, might make them some money. So I felt the perception from the customer standpoint was going to be set me up to [have] my business stolen. I don't know the exact term for it. But it just didn't seem ethical.

*Adams Depo. at 48/13-49/2 (emphasis added).*

89. NASFA President David Swift echoed this:

- A. .... [Y]our business, and if the client went – the concern here is that .... you're paying me for car insurance, okay, and you're paying me for home insurance but you're not getting – you don't see you're getting any benefit because, guess what, you're not having any claims but you're just paying out money. But over here, you're putting money into this mutual fund as an example, and let's say it starts making money, which it isn't now. But let's say it starts making money, so then the client says well, wait a second. You know, [the “partner”-agent] is making me money and you're costing me money. Then maybe I'll just transfer all my autos and homes over to [the “partner” agent]. Then through no fault of [the “partner”-agent], my client transfers over to him because he thinks he's making him money, and I'm costing him money....

*Swift Depo. at 245/14 - 246/9.*

90. State Farm agent Gabe Nazziola put his finger precisely on the problem caused by this involuntary “voluntary” program:

- A. .... So some dreamboat went and talked to some consultant and came up with this Partner Agent Program. Well, this is going to work in one of two ways. It's a sword that has a very sharp blade on both sides. Either you're going to stimulate this guy to start selling [the new product] because he doesn't want anybody else – not Jesus Christ, not the disciples, nobody else – in his business writing in his households, confusing the allegiance, disturbing the relationship, which is the whole success of State Farm – that's how he know this had to come from outside brain-dead to have the Partner Agent Program where some other agent, some AK is going to come in. You're going to give him access to all your files and all your records, and he's

going to solicit your policyholder. Now, if he never did another thing, you've immediately undermined the relationship. You've immediately created: Oh, Jesus, who the hell's my agent here? Why can't my agent sell me this [other product]? Why doesn't this guy? Not a good thing, not well-thought-out by anybody from any stretch of the imagination. So you knew that this had to [aggravate] every State Farm agent in creation. Nobody wanted anybody else into their book of business. "I'm an independent businessman. You hired me to be an entrepreneur to select, the time, the place and the method...." What's all that mean? You keep saying that they reserve to themselves the right to do this; they reserve themselves the right to do that. Do you really think that they reserved that right to come into my business when you told me it was going to be mine? You went to the heart of every agent. Anybody that was on your side, you put them against you when you came out with this idea. So we know it couldn't have been an insurance person who had this idea. Anybody that has any idea of truly what the relationship is between an agent and a policyholder could never ever have suggested something so damaging.

*Deposition of Gabe Nazziola (hereinafter "Nazziola Depo.") at 149/14 - 151/16 (attached as Garner Aff., Ex. 35).*

91. John Killingsworth, a former State Farm Area Field Executive, testified about how raiding would take place, as follows:

**Q.** Okay. Let me ask the question this way. I'm asking you to identify any registered State Farm agent who, through or because of the partner agent program, had or made contact with policyholders who were part of the book of business of a non-registered agent, and, as a result of that contact, wrote business for State Farm products other than mutual funds.

\* \* \*

**A.** I don't know how to answer that, because the only way – unless there was some aggressive marketing program which would not be allowed – that a non – that a registered agent is because the existing agent was forced to make a

referral. I am aware of cases that have been transferred --- where the entire File was transferred to the securities [registered] agent, because you can't comment on a securities product without knowing everything about that client. In that process, the client would become the client of the securities [registered] agent.

**Q.** Okay. And who transferred the file to whom?

**A.** Well, the securities [registered] agent would simply get a letter signed by the policyholder. The company would then be required to transfer the file.

**Q.** And give me the names of the registered agents who received such letters from policyholders which transferred the entire book of business to the registered agent.

**A.** I didn't say the entire book of business. I said the client.

**Q.** Okay. Now -- Okay. I am asking you to tell me the names of registered agents who, because of the partner agent program, were able to write P&C business, either auto or fire --

**A.** I didn't say they wrote the P&C business. I said it was transferred.

**Q.** What was transferred, the P&C business or the mutual fund business?

**A.** Well, the mutual fund business couldn't be transferred because the prior agent was not securities-licensed.

**Q.** So you are aware of cases --

**A.** Yes.

**Q.** -- by name where the P&C business was transferred to -- from a nonregistered agent to a registered agent?

**A.** I am aware of agents where this was alleged to have gone down.

**Q.** Ah-hah. Alleged by whom?

- A. By the agents, by the losing agents.
- Q. Okay. And which – So – All right. And how many losing agents were there who made these allegations? Were these allegations made to you? Let me ask that first.
- A. Yes.
- Q. By the losing agents?
- A. Yes.
- Q. How many losing agents made these allegations to you?
- A. Three.

*Killingsworth Depo. at 134/16-22, 135/5-137/7.*

92. Killingsworth testified as follows about the state of mind of his agents concerning the “partner-agent” program:

- A. They felt betrayed. They felt forced. They felt that a lifetime of work had come at risk.

*Killingsworth Depo. at 81/16-17.*

93. Jerry Beauchamp, NASFA’s incoming president, testified that the partner-agent programs concept of having “two agents for the policyholder” was unprecedented “in 40 years that I have been with State Farm.” *Deposition of Jerry Beauchamp (hereinafter “Beauchamp Depo.”) at 109/19 - 110/17 (attached as Garner Aff., Ex. 36).* State Farm has never announced that it was discontinuing the Partnering Program. (*Swift Aff. at ¶ 16.*)

94. State Farm claims that raiding is against its procedures, but its witnesses with knowledge of these practices testified that there is, in fact, no written disciplinary procedure in place to discipline registered agents who would raid the business of a non-registered agent. *Fisher Depo. at 197/11-198/20.*

## B. Select Agent Program

95. State Farm has unilaterally appointed certain agents as “select agents” (*Defs. Stmt. at ¶ 140*) giving them rights and privileges not extended to or reasonably available to other agents. *Swift Aff. at ¶ 17*.

96. In order to become “Select” Agents, agents must achieve certain “profitability” goals – *i.e.*, claims of their clients cannot exceed a certain level; they must submit so-called “business plans”; and they must achieve certain levels of “production” – *i.e.*, sell a certain amount of insurance. *Swift Aff. at ¶ 18; Fisher Depo. at 80/15-22; 81/1-6; Defs. Stmt. at ¶ 142 (“Agents who meet certain criteria are eligible to receive bonuses and awards from the company.”)*

97. Select Agents enjoy benefits that other agents do not, such as:

- Select Agents have a higher level of compensation.
- Select Agents are singled out by State Farm (*e.g.*, in the Yellow Pages) to the public as “Select” Agents (as distinguished from others who are not so designated. *Fisher Depo. at 166/15-17*).
- Select Agents may participate in co-op advertising with State Farm, but non-Select Agents may not. *Wright Depo. at 163/9-18 (stating “They don’t get co-op advertising if they are not a select agent”)*.
- Select Agents are eligible to receive “block” assignments while others are not. (A block assignment is an assignment of existing business that usually belonged to another agent that is re-assigned upon retirement of that agent.) *Fisher Depo. at 77/21-22; 78/1-8; Killingsworth Depo. at 95/19-21*.
- Select Agents are entitled to earn any of the bonuses originally made available to all agents, but which are now conditioned on first being a Select Agent. *Wright Depo. at 157/13-17*.

98. State Farm admits that the designation of “Select Agent” creates a distinction

between Select Agents and non-Select Agents. *Fisher Depo. at 152/11-20.*

99. State Farm, however, has not done any studies to determine whether the Select Agent program would accomplish its goals. *Fisher Depo. at 81/18-22. Deposition of Leon Maxwell (hereinafter "Maxwell Depo.") at 25/22-26 (attached a Garner Aff., Ex. 37); Wright Depo. at 188/12-16.*

100. Nor has State Farm determined that all agents would be capable of becoming Select Agents. *Fisher Depo. at 82/1-12.*

101. As a practical matter, agents in certain locations (*i.e.*, inner city or other high-risk locations) cannot achieve the profitability goals for becoming Select Agents because their clients naturally experience high incidents of loss. *Swift Aff. at ¶ 9.*

102. Likewise, the requirement to have a business plan is not at all realistic because it is unfair and administered in an arbitrary and capricious manner. *Id. at ¶ 20.* Additionally, John Killingsworth explained that the business plan element was both unnecessary and unfairly evaluated:

**Q.** Did you have any problem with the business plan element of the requirement?

**A.** I had enormous problems with it, because there was no standards to it. It was all over the board.. Some turned in a one-pager. It was not well administered at all. And my really high quality agents that produced large volumes of quality business did not want to take time sitting around writing a business plan with a group of people. They knew what they were doing. They knew how to do it. They were very intuitive. They just did the business at a very high level. But they couldn't get the benefits without writing this plan.

*Killingsworth Depo. at 94/4-15.* Additionally, Steven Knapp, shared his reason for why submission of a business plan could, in fact, undermine his business:

- A. I didn't think that it was appropriate for me to share the specific techniques that I have learned over my career as to how I secure business with anybody else. In my particular town, I have six other State Farm agents that, although we are friendly competitors, we are competitors. Why would I want to submit a plan as to how I succeed to an AFE who might share it with them.

*Knapp Depo. at 66/21-67/6.*

103. After the Select Agent program was implemented, agents who were not select agents were penalized by the loss of contractual rights they possessed even before the advent of the Select Agent Program. Board Member Mueller testified:

- Q. Have there been any reprisals against you by the company for your decision not to participate in the CRC [part of the program]?

A. Yes.

- Q. What are they?

A. By not participating in the CRC, when a life specialist became available in my agency group, I received an e-mail that stated that the life specialist could only be sent to select agents and registered representatives so I did not receive assistance with the life insurance because I was not on the CRC.

- Q. What was the position you said that became available?

A. A Life specialist. The company employed certain people and gave them certain types of training to assist agents in increasing their life insurance production and these life specialists, as they were called, were sent around to the different agents as the agents requested but prior to being able to make the request, we received written notification from our area field executive, Ginger Corell, that unless you were a select agent and a registered representative, they could not send this life specialist to our office.

- Q. So that the life specialist was somebody who State Farm went out and hired?

- A. Yes.
- Q. As a resource that the company made available to certain agents?
- A. To certain agents.
- Q. Free of charge?
- A. I believe it was free of charge.
- Q. And the company decided that these life specialists would be made available only to select agents?
- A. That is correct.

*Deposition of Clifford Mueller (hereinafter "Mueller Depo.") at 33/6-34/20 (attached as Garner Aff., Ex. 38).*

- A. .... [T]hat but, also, in the preamble of the contract, it says, paragraph 4, "We will provide you through our personnel with information and guidance as to the operation, conduct and financial management of your agency and from time to time we will designate specific employees to advise you regarding your activities." Well, they are saying that they will give me employees to advise me in my activities. One of my activities for which I have contracted is the sale of life insurance. And by not allowing me access to that specialist, given what I have just read you, I feel like the company has violated the contract in that regard.

*Mueller Depo. at 44/7-20 (emphasis added).*

104. John Killingsworth, a former State Farm manager, testified as follows about the Select Agent program:

- Q. What was your view, if any, as to the appropriateness of the Select Agent Program?
- A. I did not like it at all.
- Q. Why?

- A. Agents should not be, in my judgment, differentiated against. The achievers should be rewarded, but not issues like this, to divide and differentiate. It was very – in my judgment, a very divisive policy. Created a lot of hostility. Greatly diminished the relationships. On the heels of the Grow ....

*Killingsworth Depo. at 89/19-90/3.*

**C. Mandatory Meetings**

105. State Farm’s Agents’ Agreements state that agents will be “”invited” to meetings, not that they must attend. *Garner Aff., Exs. 1-3.* (“We will invite you to attend meetings for the purpose of introducing new products, ideas, services and procedures, promoting sales, and furnishing you with assistance, guidance and consultation.”) (*emphasis added*).

106. State Farm requires its agents to attend certain “compliance” meetings in person. *Fisher Depo. at 234/16-22.*

107. The mandatory nature of these meetings was confirmed by Chuck Wright, as follows:

Q. And does that involve a meeting between somebody from the agency field and the agent?

A. It could.

Q. Okay. Is that a required meeting?

A. Well, required in what sense?

\* \* \*

Q. If the agent doesn’t want to participate, the agent doesn’t have to?

A. If the agent doesn’t want to participate in the program, we might have to reevaluate our relationship with the agent.

*Wright Depo. at 111/18-22, 112/9-13.*

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108. State Farm has considered terminating agents who do not attend these mandatory meetings. NASFA Board Member Clifford Mueller testified:

A. It would be one way. Were it not for the contract saying that I will be invited to meetings, okay? Now, invitation under termination is not much of an invitation, as far as I can understand that. And there are LUTC [continuing educational] courses that are taught by competent professionals for which agents would receive continuing education credits, okay, so there are many more ways to guarantee the ethics of your agency force rather than forcing them to go to a meeting or be terminated. I had a health condition at one point in time that made it difficult for me to get to a meeting and I was told flat out, “You don’t go to the meeting, you will be terminated.”

Q. Who told you that?

A. Ralph Brittain [State Farm Manager]. Real simple.

*Mueller Depo. at 73/4-18 (emphasis added).*

109. This is evidenced in an email from Ralph Bolt to Chuck Wright, on August 22, 1997, which stated “[a]n open issue is how to assure 100% attendance by Independent Contractor[s]. We have some ideas on license renewal we’ll be checking out.” *See Garner Aff. at Ex. 39.*

110. These meetings cut into the agent’s working day, when other methods of conveying the same information, such as home study, are available. *Swift Aff. at ¶ 21.*

111. Moreover, not even State Farm executives attend these “compliance” meetings. *Wright Depo. at 128/5-6; Trosino Depo. at 102/20-24.*

112. State Farm admits that the Agent Agreement contains no language that says the Company can require agents to attend meetings. *Fisher Depo. at 236/2-5.* State Farm further understands the contract to mean that the company is not going to direct agents on how to

conduct day-to-day business. *Fisher Depo. at 238/13-22; 239/1.*

**D. Internet Sales**

113. Agents have protected territories. *Garner Aff., Exs. 1-3 at Section I(H).*

114. State Farm is selling insurance over the Internet, violating the agents' rights to be free from encroachment and to enjoy unencumbered relations with their policyholders. *See Garner Aff., Ex. 40.*

115. As recently as May 16, 2004, a customer can log onto State Farm's website, statefarm.com, and purchase an automobile or renter's insurance policy if they live in the states of California, Illinois, Missouri, Ohio, Oregon, Tennessee, and Washington. *See Garner Aff., Ex. 40.*

116. Agents in the states enumerated above were as to sign an amendment to their contract, commonly-referred to as the alternate access points amendment. *See Garner Aff., Ex. 41.*

117. An agent must sign the amendment in order to be assigned policies sold directly by State Farm over the Internet and also provides for a reduced-rate of commission. *Id.* As such, State Farm is competing with its agents for business because agents are not getting the business they would otherwise get, but rather, they receive reduced commissions. Agents receive just 3% commission on referred Internet sales, compared to a normal commission of 8 to 10% on automobile policy sales and a normal commission of 10 to 15% on homeowner's sales. *Id.; Ex. 1 (AA3); 2 (AA3); and 3 (AA97)*

118. Furthermore, State Farm does not allow agents to have their own web sites. *Wright Depo. at 151/3-13.*

**E. Curtailment of Product Sales**

119. Beginning in late 2001 or early 2002, State Farm unilaterally discontinued selling certain insurance products through agents, curtailed product lines that agents could sell, imposed new and onerous requirements upon agents as a condition to their selling certain lines of insurance, reduced commissions and otherwise made the business and profession of being a State Farm agent more burdensome, expensive and oppressive. *Swift Aff. at ¶ 22*. During 2002, State Farm restricted sales of insurance products in 43 jurisdictions, and as of January 2003, in 25 jurisdictions. *Affidavit of Barry Thomas (attached as Garner Aff., Ex. 55)*. A document produced in the deposition of Mr. Thomas shows the extent of business curtailment by State Farm. *Garner Aff., Ex. 42*.

120. Mary Bitzer, a Senior Vice President for State Farm's Central Zone, was offered by State Farm as a witness to testify on the subject of market restrictions. *Bitzer Depo. at 6/18-24*.

121. Ms. Bitzer has authority within the five-state area that she represents to restrict business. *Id. at 6/25; 7/1-3*.

122. Ms. Bitzer described the process of deciding to restrict sales of insurance as not involving any regular compilation of information or regular list of reports. *Id. at 9/11-14*. For example:

**Q.** Is there any kind of written procedure that dictates how you go about making the decision with respect to restricting business?

**A.** No.

**Q.** Okay. How do you know what the procedure is?

**A.** There is no procedure.

*Id. at 10/3-8.*

123. Similarly, she testified that there was no particular standard or criterion with respect to the effect on State Farm agents that the Company takes into account when making a decision on restrictions of new business. *Id. at 29/9-14.*

124. The reality is that restrictions on business result in significant decreases in the number of new policies an agent may sell. For instance, for the area of South Texas, the result of restrictions on the number of new fire policies that an agent could sell was severe.

<b>Year</b>	<b>Average Book of Business of Agents</b>
1998	143
1999	156
2000	166
2001	180
2002	95

(year that restrictions were imposed)

*Garner Aff., Ex. 43.*

125. Even though the Agent Agreement contemplates that State Farm may allow agents to broker the products of other companies, State Farm has refused to allow its agents to market insurance offered by other carriers (even those which do not compete with State Farm on a full-line basis) as replacement products for the ones it has prohibited them from selling under its market restrictions. *Swift Aff. at ¶ 23.*

126. State Farm looks at no documents that pertain specifically to agents, to the effect of any restriction on agent compensation; and there is no discussion of agent compensation. *Id.*

at 29/15-19; Deposition of James Casino (hereinafter "Casino Depo.") at 24/15-18 (attached as Garner Aff., Ex. 44); Trosino Depo. at 144/13-145/3. Additionally, Vince Trosino testified:

**Q.** Is there a general policy that State Farm follows with respect to giving agents permission on soliciting the products of other companies?

**A.** It's extremely limited ....

*Trosino Depo. at 145/17-20.*

127. While State Farm claimed in discovery that in evaluating agent requests to broker other lines of insurance, it considered a number of factors. *Fisher Depo. at 303/8-304/1.* These factors were enumerated in a letter from Michael Matlock, State Farm Central Zone Agency Vice President, as follows:

[t]he general market situation, the potential for conflicts of interest, the possibility of customer confusion, the potential for claim handling complications, the potential liability to State Farm in the event that the other insurer fails to perform to the client's satisfaction, the difficulty in protecting trade secrets, the protection of the State Farm brand, the value of the training and support provided to the Agent and staff, the long term potential to market the line of business through State Far or a partnered company, and the potential for strained Agency loyalty.

*Garner Aff., Ex. 45.*

128. Mr. Fisher testified that State Farm had to consider agents' requests to broker business for another company in good faith.

**Q.** Now, if an agent makes a request to State Farm to broker the business of another company, would you agree that State Farm has to consider that request in good faith?

**A.** Yes.

*Fisher Depo. at 300/16-20.*

129. State Farm's witnesses were unable to provide specific documentation, studies or

examples to show that those factors were in fact applied or that they ever related to the objectives

State Farm sought to accomplish. Mr. Fisher testified:

**Q.** Let me ask the witness with respect to State Farm agents' solicitation of business with these insurance companies that we've named earlier, and if you want me to rename them I'll do that. Do you know if it has experienced any confusion on the part of its policyholders as to who is insuring them?

**A.** I don't know.

\* \* \*

**Q.** Do you know whether State Farm has experienced any difficulty protecting its trade secrets with respect to business done with these other companies?

**A.** I don't know.

**Q.** Do you know if any of these other companies have unfairly competed with State Farm because of State Farm doing business with them?

**A.** I don't know of any particular instances.

**Q.** Has State Farm ever undertaken any study to determine that doing business with other insurance companies would have an adverse effect on it, competitively?

\* \* \*

**A.** I've never heard of any task force or study group, no.

**Q.** Okay, and where did the information about other companies' E&O insurance come from?

**A.** It came from the gentleman with whom I work who is our E&O contact.

**Q.** Did he survey other companies' E&O insurance?

**A.** I have no idea.

\* \* \*

Q. What study, if any, has State Farm ever done on the possibility of confusing policyholders if State Farm authorized its agents to solicit the products of other companies?

A. I don't know what study.

Q. Has it done any study or review of any potential complications with respect to claims handling?

A. I don't know.

Q. Has it studied or looked into any potential liability that State Farm or its agents might have if business was placed with a company that didn't pay on claims?

\* \* \*

A. I don't know about a study.

Q. Other than a lawsuit, do you have any information?

A. I would assume, we would simply ask our own underwriting and claims what complications that would present. I don't know of any study. I don't know who asked who. I don't know. That's not my area.

Q. You don't know of any particular questions that were asked of anyone?

A. No.

*Fisher Depo. at 106/8-15; 113/9-17; 123/2-5, 19-22; 124/1-5, 124/15-125/5, 9-19.*

130. Rather, State Farm has simply denied those requests, without giving any particular reasons. *See, e.g., Beauchamp Depo. at 191/13-192/12* (stating he asked his State Farm manager "Does it look like you would even consider it [allowing brokering]? And was told "No, never").

131. State Farm's arbitrary exercise of its discretion is exemplified in the experience of  
204370/2459.1

NASFA Board member Clifford Mueller. He testified:

- Q. So it was your intention, if State Farm had given consent to you to place fire insurance with Northern Neck or Loudoun –
- A. Loudoun County Mutual.
- Q. --Loudoun County Mutual, it was your intent to provide that insurance to them from those companies but then switch them over to State Farm down the road when State Farm authorized you to –
- A. If and when --
- Q. -- increase production again on fire insurance?
- A. If and when State Farm got back in the fire insurance business, that would be a reasonable assumption to make.
- Q. Okay. Reasonable assumption being that you would then switch them over to State Farm from whatever you had provided them or sold them before?
- A. Yes. Yes. That's why I was so incensed at Mr. Whitney's [State Farm's] e-mail stating that I had talked about Allstate and Nationwide, who are direct competitors of State Farm, whereas Loudoun County Mutual and Northern Neck only write fire insurance and he knew that.

*Mueller Depo. at 96/13-97/13.*

\*\*\*\*\*

- Q. So on October 24<sup>th</sup>, 2002, you sent this e-mail requesting permission to place fire insurance with a company other than State Farm.
- A. Yes, sir....
- Q. So after the e-mail, you had a conversation with Mr. Whitney?
- A. Yes, sir....
- Q. And what is Mr. Whitney's position?

- A. He is regional – well, he would be analogous to a regional deputy vice president. He is a vice president in charge of agency for Virginia in the zone....
- Q. And what did he say to you in the conversation, I'm not talking about the e-mail yet?
- A. I would refer you to item 11, which is some notes that I took on a 5-by-7 steno pad. He first informed me that brokering business was against the contract and I referred him to the contract telling him that it wasn't against the contract if I had written permission of State Farm and his response to me was that it was not in our mutual interest to have me have the authority to broker. Of course, it was no money out of his pocket, the money was coming out of my pocket.
- Q. That's your comments to me now, right? I just want to distinguish.
- A. No, I did not say that to Mr. Whitney at the time, no.
- Q. I'll let you say whatever you want but let's just get clear what was in the conversation and what wasn't.
- A. Then I asked Mr. Whitney, as has been a problem in the past on occasion, if he had the full authority of the company to grant or deny such a request. And his response was Mr. Thompson would refer any such requests to him and, "I have full authority to grant or deny such a request." So it would appear that you don't have to go very far up the corporate ladder to get that permission. "Just wanted to make sure what you were asking for." Oh, his phone call – his comments to me was that he wanted – he was making the phone call in order to be certain what I was asking for and then he stated emphatically, "You can't broker business." I said since the contract required me to put my request in writing, I was asking for him to put his denial in writing and he said, "Sure, I'll put it in writing," and then his answer, which was not accurate, I responded to stating that he must have misheard what I said....
- Q. Okay. And on item 11, which you referred to, which is your contemporaneous notes of what you and Mr. Whitney said to each other –

- A. Yes, sir.
- Q. -- you wrote, "I did not say Allstate or Nationwide and said -- I said Loudoun County Mutual or Northern Neck." You went back and wrote this later, I guess, after you saw his return e-mail?
- A. Yes, after I saw his return e-mail. That's why there is a line there.
- Q. Okay. So the next thing that happened, I guess, and it is all on the same day, October 24<sup>th</sup>, you got this return e-mail from Mr. Whitney, and it speaks for itself, I don't have to ask you to read it but what did you do after you got this return e-mail from Mr. Whitney?
- A. There was nothing to do. I can't broker so boom.
- Q. So did you call him back and say, "You got it wrong. I never said Allstate or Nationwide, I said Northern Neck and Loudoun County"?
- A. I have a draft -- let me read it here. Item 14. Now, this is a draft of the e-mail I sent on 10/29/02 at 10:20 a.m., stating that he must have misheard me and that -- "You must have misheard the companies I named as examples/possibilities for such brokerage. They were Loudoun County Mutual or the Northern Neck, both of which write nothing but fire insurance. Allstate and/or Nationwide never passed my lips as a company with which I ever considered a business relationship."
- Q. And it is your testimony that you sent this as an e-mail to Mr. Whitney?
- A. 10/29/02 at 10:20 a.m.
- Q. Did you get any response?
- A. Not that I am aware of....
- Q. But, nevertheless, you sent him this e-mail on October 29th?
- A. Yes, because I thought it was incumbent upon him to be infinitely more accurate with what his agents had requested.

I could see a vice president of agency not wanting a State Farm agent to broker with Allstate or Nationwide, as they are multi-line companies, but what we were discussing was fire insurance and the two companies that I picked write only fire insurance, which State Farm was not writing at the time so there would be no conflict of interest as there would be with Nationwide and Allstate....

**Q.** This is item 15, if you will take a look at it. I take it you had this document in your files?

**A.** Yes.

**Q.** Okay.

**A.** I'm also chairman of the Northern Virginia Agents Association and send out a newsletter once a month and this was one of the items that I had put in that newsletter.

**Q.** Does this relate at all to your request to broker business?

**A.** I had – I thought it related, in that State Farm allows very selective brokering of business when it suits their purpose and this AON association with State Farm was merely an example of that to my counsel. I know that in Alabama they allow brokering of certain types of insurance, there is in Northern Virginia a brokering of health insurance with Fortis, there is brokering of life insurance with a company called Phoenix, I think it is Phoenix Mutual, I'm not sure, and it was merely to bolster my case that the rejection of my request to broker insurance was arbitrary and capricious in the extreme.

*Mueller Depo. at 100/19-108/21.*

132. Since at least 1977, State Farm has never limited the number of policies that agents may sell. *Swift Aff. at ¶ 22.* Thus, the Agent Agreement, as confirmed by the parties' course of dealing over several decades, is that agents may sell new insurance policies without limitation.

133. The idea behind allowing agents to broker lines of insurance not presently offered

by State Farm is that when State Farm commences again to offer the coverage, the State Farm agent (whose AA3 or AA4 contract provides for retirement based on his last year of earnings) has every incentive to move the policyholder to the State Farm policy. As NASFA President Swift testified:

- A. Sure. Because at the time, State Farm was not in the market, and if they allowed us to broker the business, we could write the business for a period of time, being able to save the business without losing the entire book of business. And then we would put it back in State Farm when State Farm will take it, if they want it, because our retirement is based on our book of business....

*Swift Depo. at 156/2-10.*

- A. .... I would like to say right here, I don't think – what we're trying to establish here is that we're not trying to take the business away from State Farm and do something else with it. We're only trying to be able to sell that business so we can keep the total book of business we have and then put it back with State Farm when they're ready to write again.

*Id. at 157/10-17.*

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RESPECTFULLY SUBMITTED,

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