

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

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NATIONAL ASSOCIATION OF :
STATE FARM AGENTS, INC.,

Plaintiff,

v.

Civil Action No.:

STATE FARM MUTUAL, :
AUTOMOBILE INSURANCE :
COMPANY, et al,

02ca004089

Defendant.

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Washington, D.C.

Monday, August 1, 2005

The above-entitled action came on for
a Bench Trial before the **HONORABLE LEONARD BRAMAN**,
Associate Judge, in Courtroom Number 318, commencing at
approximately 9:00 a.m.

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IT REPRESENTS THE RECORDS OF TESTIMONY
AND PROCEEDINGS OF THE CASE AS RECORDED.

Margary F. Rogers
Official Court Reporter

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APPEARANCES:

On behalf of the Plaintiff:

MICHAEL GARNER, Esquire

On behalf of the Defendant: _

PAUL REICHLER, Esquire

LAWRENCE MARTIN, Esquire

JAMES WRIGHT, Esquire

SARAH ALTSCHULLER, Esquire

Washington, D.C.

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P R O C E E D I N G S

DEPUTY CLERK: Your Honor, resuming in the matter of National Association of State Farm Agents, Incorporated. versus State Farm Mutual Automobile Insurance Company and others, Civil Action Number 02-CA-4089.

Counsel, your names, please.

MR. GARNER: W. Michael Garner, Dady & Garner, Minneapolis, for the Plaintiff.

MR. REICHLER: Paul Reichler, Foley Hoag, Washington, D.C., for the Defendants.

MR. MARTIN: Lawrence Martin, Foley Hoag, Washington, D.C., also for the Defendants.

MS. ALTSCHULLER: Sarah Altschuller, Foley Hoag, Washington, D.C., also for the Defendants.

THE COURT: Please be seated.

On Friday, we completed the taking of testimony in this bench trial. And we're convened this morning to hear the closing arguments. Again, we'll proceed with a topical approach, modified slightly from the sequence that we used at trial.

Mr. Garner, I'll hear you on the Partner Agent Program. And I remind counsel that there's a time restriction of 10 minutes on each subject.

MR. GARNER: Very well, Your Honor. May I deliver the closing with the assistance of the flip chart here?

THE COURT: Yes, you may.

MR. GARNER: And I have a hard copy of -- or a small hard copy of the flip chart, if Your Honor wishes.

THE COURT: Yes, it would be helpful. Pass it up to the clerk.

MR. GARNER: Here's one for Mr. Reichler. And here are two for the Court.

Thank you, Your Honor.

CLOSING ARGUMENTS ON PARTNER AGENT PROGRAM

MR. GARNER: Let me start with an overview of the Partner Agent Program and Plaintiff's evidence. First of all, both of our witnesses testified and referred to the agent's agreement, that the company respects the agent's book of business, and it does not refer -- historically, has never referred policyholders to other agents.

This testimony was not contradicted by State Farm. There were four other aspects that I will go into detail here on. They testified that the program was mandatory, that the Partner Agent Program required nonregistered agents to appoint a partner or have one appointed by the company.

Our witnesses testified that they were told the company was doing this because customer demand was driving customers to buy mutual funds, and that the company was responding to that. They testified that there was a true risk of rating their agents, and that there was a risk that the Partner Agent Program would be expanded to encompass products other than mutual funds.

Turning to the first of the four additional issues, the Partner Agent Program the evidence shows, was mandatory. The agents testified that they were told it was mandatory and that this statement was never withdrawn, they never heard anything to the contrary.

If we look at Plaintiff's Exhibit 91, we see 21 e-mails. I say last week -- it was actually week before last -- that say, in substance, appoint a partner, or I, the AFE will appoint one for you. This is the mandatory nature of the program.

THE COURT: Mr. Garner?

MR. GARNER: Yes, Your Honor?

THE COURT: If we look at those e-mails and compare them with a number of AFEs that were avail -- that were involved in the RRRD program, if we can call it that, of which the 21 e-mails to which you refer apply, does the confusion seem to be isolated and limited compared to -- what did we have? What was the testimony, 500?

MR. GARNER: 500 AFEs.

THE COURT: Yes.

MR. GARNER: Your Honor, candidly, the evidence is inconclusive on that point. We collected those e-mails because agents sent them in to us. Members of NASFA sent them in to us.

Now, having made that showing, it's our view that it was incumbent upon State Farm to come forward and show what happened with the rest. We don't know. What we do

know is that there were these e-mails.

The only construction that's been put on the direction that went out from headquarters was that this was a mandatory program. So with respect to the other 479 AFOs, we, the Plaintiff, have no real way of getting access to that. All of this came in over a very short period of time, with no opportunity for a document request or discovery.

But State Farm does. And it did not come forward with any evidence of what had happened with the other 479 AFOs.

THE COURT: Proceed.

MR. GARNER: I'm going to come to that. Because when we see the corrective communication that Mr. Fisher had sent out, Defendant's Exhibits 69 to 72, Point Number 1 is we see that it did not go to the agents; it went to the AFOs. We see no communication directly to the agents. My recollection is that that corrective communication, I think did go out to all of the AFOs. That is a -- I believe that it did.

What's also interesting about the corrective communication, it picks up language from the frequently asked questions. It restates what the RRRD program is.

But let's keep in mind that at the time that went out, the time the corrective communication went out, the 20th -- the 19th, 20th, 21st of July, as they say, the horse was out of the barn.

In the e-mails, the AFOs were asking the agents to appoint a partner by July 15th, perhaps by July 19th. By the time the corrective document goes out, that's been done, if it's been done at all. That's been done. There's nothing in the corrective communication that says to the AFOs: Notify your agents that if they made an appointment, they can undo it now. Not a word of that. Not a word of voluntary in that corrective communication.

Now, let's look at State Farm's evidence that the Partner Agent Program was discontinued. Once again, we have seen nothing written to the agents, trial witnesses that were called here, Mr. Sikora, Mr. Fisher, these were people who were high up in the State Farm home office. They didn't have personal knowledge of what happened at the agent level. They had knowledge of what happened with -- between themselves and AFOs or between themselves and a liaison office in Dallas, who then communicated with the AFOs.

In fact, when we're talking about when the partner agent program was discontinued, if we look at our exhibit -- our deposition excerpts -- and I've -- I've created the initial PSD, Plaintiff's Summary of Depositions. It's really not a summary; it's deposition excerpts.

At page 16 Mr. Trosino, who is the chief operating officer of State Farm, says the Partner Agent Program was in effect in April, 2004, when his deposition was taken.

That's seven, eight months after August, 2003, when the Defendant has contended that the program was changed to the RRRD.

Let's look at the RRRD. Even as it has been portrayed in this trial, the agent still has no choice. It's either pick an agent or get picked. Your Honor characterized the PAP as a shotgun marriage. We characterize the RRRD as spin the bottle. At best, if you don't pick a partner agent, one will be picked for you on a rotation basis.

Again, there's no written communication that we see, announcing the program to the agents. The evidence, under the RRRD of referral, is contradictory. Mr. Sikora said there's no referral unless there is an application made by the policyholder. In fact, Plaintiff's Exhibits 71 and 72 say, referral is made upon inquiry by policyholder. And, in fact, 72 says that the company sends out material on inquiry, and contacts the non-registered agent and the registered agent.

And once again, referral is only made to a select agent. Very briefly, the agents were told this was driven by customer demand. If we look at our deposition excerpts at page 12, we have testimony from Mr. Fisher that says no studies or documentation -- I think it was Mr. Fisher. It may have been Mr. Wright -- no studies of -- or documentation was made to show customer demand. And, in fact, the one study that was done in Iowa, Plaintiff's

Exhibit 17, showed absolutely no demand for this.

There is a real risk of rating under this mandatory program. Mr. Killingsworth, a former employee of the company, said the Partner Agent Program was designed to take business from agents and redirect it to trainees. He said the -- there was a practice in the zone office of changing policyholders from one agent to another, without notification to the agent or a written instruction from the policyholder.

This was confirmed by Mr. Knapp's testimony. Interestingly, State Farm did not refute this evidence. No witness from State Farm testified that this was not the case.

Plaintiff's Exhibit 72, this says that if the agent under the RRRD appoints a partner, the partner is admonished not to raid. If the agent does not appoint a partner and one is appointed in the rotation system, there is no admonishment.

THE COURT: Mr. Garner, your 10 minutes are up, sir. How much --

MR. GARNER: I -- I will do it in one more minute.

THE COURT: Very well.

MR. GARNER: Thank you, Your Honor.

Let me comment briefly on the quality of the evidence. Our agents had personal knowledge. They testified about meetings where they were told about this program, personal observations of practices at State Farm

and admissions by State Farm personnel.

State Farm witnesses were not involved with agents on a daily basis. They did not contradict the agents' testimony in many respects. And, in fact, State Farm did not call any zone managers or people who actually worked with these witnesses. Documentary evidence, there were no direct communications with the agents.

Missing documents, we saw nothing that actually was given to the agents. There was reference to a video presentation announcing the PAP. We didn't see that videotape. And, in fact, as we saw, there is evidence between Mr. Sikora's testimony and Exhibit 71 and 72.

Our conclusion is, both the Partner Agent Program and the RRRD violates Section 1-B of the contract, which provides the agent as an independent contractor, and 1-H of the agreement that says the company will not transfer business from one agent to another, and the long-standing custom and practice of the company in respecting the agent's book of business.

What we are seeking at the least is a declaration that State Farm will not require agents to pick a partner, to have a partner picked for them, or send their customers to another agent.

Thank you, Your Honor.

MR. REICHLER: Good morning, Your Honor.

Your Honor, the evidence shows, and it's without contradiction, that the Partner Agent Program, as such,

ended in August, 2003. All of the witnesses agreed that it was over by then. Of course, you have the testimony of the three State Farm witnesses, Mr. Sikora, Mr. Wright and Mr. Fisher, who all testified that the Partner Agent Program ended or was substantially overhauled as of August, 2003. But also, every single one of Plaintiff's witnesses who testified, agreed that was over by then.

Now, unfortunately, neither side has been furnished with the transcript from Tuesday, July 26th, so I can't cite the transcript pages. However, I can cite to the depositions of the witnesses who did testify at trial last Tuesday.

THE COURT: You may supplement your closing argument when you get the July 26th transcript, which I understand will be ready today.

MR. REICHLER: We will do it by tomorrow then, Your Honor. If we get it today, we'll have it supplemented by tomorrow. But I will point out in the meantime --

THE COURT: Let me make a note of that, please.

MR. REICHLER: I'm sorry, sir?

THE COURT: Let me make a note of that.

MR. REICHLER: Oh, yes. Sorry to be rushing. I'm conscious of the time. That's all.

THE COURT: Proceed.

MR. REICHLER: So, Your Honor, in the interim, without the benefit of the trial transcript, I will simply mention that Mr. Swift, Mr. Knapp, and Mr. Mueller, all of

whom testified, all agreed at their depositions.

Mr. Swift, deposition page 247 and 248; Mr. Knapp, deposition page 69; Mr. Mueller, deposition page 66 and 67, all of them agreed that the Partner Agent Program was over as of the time of their depositions in the year 2003, that it was not a problem, that it was never implemented, or not implemented.

Every single one of them said it at deposition. I asked them about it at trial, and they reconfirmed that. And we'll have the trial transcript pages for you tomorrow morning.

Also, Exhibit D-55, which is a document that NASFA sent out to all its members, indeed all State Farm agents in July of 2003, said the Partner Agent Program is in a coma, and it's not going to be revived.

Now, the testimony is also uncontradicted that the Partner Agent Program was replaced by the RRRD in August, 2003, and that the RRRD was completely voluntary. We have, first of all, the testimony again, of Mr. Sikora, Mr. Wright, and Mr. Fisher, all testifying that the RRRD went into effect in August, 2003, and that it was completely voluntary.

No witness of Plaintiffs, and they had four witnesses on the Partner Agent Program, none of them uttered a word about the RRRD. So they didn't -- the witnesses did not contradict anything State Farm's witnesses said.

Moreover, at the request of the Court, we searched diligently, as the Court will recall, and found contemporaneous documents written by Mr. Sikora, regarding the RRRD. For example, Court Exhibit 3, a communication by Mr. Sikora, of August 6th, 2003, to all the senior vice presidents, agency vice presidents, vice presidents agency. He said, quote, "While we continue to encourage non-registered agents to select a registered agent for referrals, the program is voluntary." Bullet point, "All non-registered agents will have the opportunity to voluntarily" -- shall I give the Court a moment to find Court Exhibit 3?

THE COURT: No, that's all right. Continue.

MR. REICHLER: All right. You remember Mr. Garner cross-examined our witnesses: Where in this document does it say voluntary? Well, in Court Exhibit 3, "All non-registered agents will have the opportunity to voluntarily" -- and that's in bold type -- select a registered fellow agent for their referrals." This whole bullet is in bold type.

The nonregistered agent may choose not to select an agent for referrals. The word "not" is not only in bold type, it's all capitals.

On August 21st, also part of Court Exhibit 3, Mr. Sikora sent the following to all 500 AFOs. And it says, "The attached listings should be sent to the appropriate agency field executive for review with all

agents within an AFO. That's the way State Farm communicates -- the State Farm corporate headquarters in Bloomington, Illinois, communicates with its agents, through the AFEs, rather than bypassing the chain of command.

THE COURT: What's the exhibit number?

MR. REICHLER: This is still Court Exhibit 3, Your Honor. Court Exhibit 3 consists actually of two different communications from Mr. Sikora. The first one that used the word, "voluntary" is dated August 6th. I'm reading now from one dated Thursday, August 21st.

And again, this is sent to the AFEs, quote, "For review with all agents within an AFO." Then as we turn the page, we see -- here's the instruction to the AFEs. It says, "To AFEs, subject, RRRD." Quote, "If a nonregistered agent elects not" -- that's capital N-O-T "to select a registered agent for securities products referrals, no agent will be recorded on the database."

So all of this was communicated to the agents. The AFEs were instructed to do that. How do we know that the AFEs carried out their instructions? How do we know that the AFEs carried out their instructions? Because 94 percent of the agents responded and selected a referral agent. And that's how the database got compiled. So we know the AFEs were instructed; we know they carried out the instructions; we know the agents got -- told the AFEs whether they wanted to select or not.

Now, as far as the -- also, as Your Honor knows, Exhibit P13 is the frequently asked questions which were given to the AFEs, also dated August 20, 2003. What did they say? They say the agent is free not to select. And if he doesn't select, no one will be appointed with him. And that's different from the way the old Partner Agent Program was. It says no one will be appointed for him if he doesn't select.

Now, the RRRD itself, Court Exhibit 4, Your Honor has sample pages and has seen that when for those agents who did not select a referral agent, it's left blank. So it reflects the fact that no selection was made and that no one was appointed for them.

Now, the Plaintiff's documentary evidence does not -- there's no testimonial evidence to contradict this -- the Plaintiff's documentary evidence does not negate that the RRRD was voluntary. The ASR -- this administrative group wanted to update the database. On July 1, 2005, they sent a communication to 500 AFEs saying please update the database. There's nothing in there that says the program was mandatory or anything like that.

I will respond to Mr. Garner's question. State Farm has no documents, no communications, from any other AFEs or any other agents, suggesting that this misunderstanding was general or that it spread beyond these 20 or so people. Mr. Garner said --

THE COURT: Mr. Reichler, you don't want to

testify.

MR. REICHLER: Correct.

Anyway, in any event, it's Mr. Garner's burden to show that -- or the Plaintiff's burden to show that there is a problem here. They've produced 21 -- or 20 to 21 AFEs who wrote instructions to agents. And out of 500 AFEs, that's less than four percent. There's no evidence that the problem or the misunderstanding spread beyond that. It's their burden to show that.

Mr. Garner said 21 AFEs said, if you don't pick, I will. I think he's mistaken. There are only three AFEs who wrote that. The rest of them said, please select.

THE COURT: Aren't those documents peculiarly within the possession of the -- of the Defendant, considering that discovery time has passed?

MR. REICHLER: Your Honor, they -- we'll be happy -- if Your Honor wants us to respond to a further discovery request of any kind, we'll be happy to do it. We have no objection to that. As far as how the documents came about, I think that the testimony that came into our possession, the testimony is there.

But, Your Honor, as soon as State Farm was advised that there was this misunderstanding or misconstruction by 20 or so AFEs, again, only three said, if you don't select, I will. The others said, please select, which created a possibility of misunderstanding. They should have been more forthright in saying, you don't have to do this.

Mr. Fisher testified to that. He said all of these 21 e-mails were inappropriate, in his opinion. And what did he do? He immediately took corrective action. He sent e-mails to every single AFE, all 500, in case that there was one or more, or who knows how many beyond these 21. All 500 AFEs received his e-mail.

And he didn't make up a new policy. He quoted from the frequently asked questions, which had -- which were in effect since August of 2003, and reminded the AFEs, this is the policy. This is what the RRRD is. So he was quoting from existing policy, which had been on the books since 2003.

There was confusion. State Farm immediately took corrective action and told the AFEs, you must communicate with your agents and straighten this out immediately.

THE COURT: You have another minute, Mr. Reichler.

MR. REICHLER: Yes.

Now, I'd also like to point out that the original Partner Agent Program, which was in effect from October, 2001, to August, 2003, did not violate the contract either. Mr. Garner said there were two -- witnesses testified there were two main problems that they had with this. Some agents, certainly his agents, they were -- didn't like the idea that there might be direct marketing to the people in their book of business. And they were afraid of that rating.

The evidence shows that State Farm -- that there was no direct marketing to the customers in anybody's book of business. State Farm deliberately decided not to do that after they heard some reaction to this from the agents. Also, there is no evidence that any rating took place. Plaintiff's witnesses admitted that they had no evidence of any rating. And they didn't cite any evidence of any rating.

And the evidence is that State Farm took every precaution to prevent rating, including Mr. Wright talking to Mr. Swift directly and assuring him that the company would make sure there was no rating. So it didn't take place.

Also, one last point, Your Honor, and then I will conclude. The idea, was this mandatory or voluntary. First of all, the evidence is unchallenged that 79 percent of State Farm's agents voluntarily nominated a partner agent.

Now, what about the other 20 percent? Mr. Garner calls it a shotgun wedding. Well, I think the evidence will show this. Yes, under the Partner Agent Program, which ended in August, 2003, and this feature was changed in the RRRD. If the agent did not voluntarily pick a partner, the company matched him up with somebody; that's true.

But the evidence also shows, Your Honor, and this is uncontradicted, that there was no obligation on the part

of the nonregistered agent to actually refer anybody to the so-called partner agent. There was no obligation to share any business with the so-called partner agent. And, in fact, as Mr. Swift himself acknowledged, their witness, agents were free at all times to refer mutual funds customers to other people, people other than the agent that the company had matched them up with.

Mr. Swift referred to his friend Jerry Kimball because he trusted him more, even though the company did not match him up with Mr. Kimball. So really, what were these match-ups? These were paper match-ups. This was not a shotgun wedding. They weren't forced to live together, to cohabit, to take vows, to have children together. This was like two names the company matched up. If the nonregistered agent didn't want to do business with them, he didn't have to.

Mr. Wright testified he was aware of many cases where agents simply refused to refer business to their partners. He couldn't do anything about it because they were independent contractors. So what was this used for? In the event -- last point -- in the event -- or I'll stop now if Your Honor wants me to. I don't want to abuse my time.

THE COURT: Make your last point in 30 seconds, please.

MR. REICHLER: What was this used for? In the event there was a call-in, or an inquiry, or an application

from a customer, the company had somebody who they could refer the customer to who was licensed to do this. And that was primarily so the company could keep control of the partner agent so he couldn't engage in raiding.

THE COURT: Thank you, Mr. Reichler. I want to ask you before you're seated --

MR. REICHLER: Yes.

THE COURT: -- Mr. Wright, in response to the Court's question, stated that the contract with the agents was confined to the solicitation and sale of the insurance. And there was nothing in the contract that required the agents to sell securities or to have anything to do with securities?

MR. REICHLER: That's correct.

THE COURT: Is that -- does that agreement of that testimony accord with your understanding of the contract?

MR. REICHLER: Yes. And may I explain?

THE COURT: Yes.

MR. REICHLER: That's correct, Your Honor. Agents were free to choose not to engage in the solicitation or sale of mutual funds. Those that did choose to engage, had to first become licensed with NASD (sp), I believe, state and federal licensed. And then when they did, they signed a separate agreement with State Farm pertaining to their sale or solicitation of mutual funds. They had to be registered to do it.

And, in fact, under the Partner Agent Program, as

Mr. Garner said, the partner agent had to be a select agent; that's true. But as Mr. Wright testified, all of the registered representatives -- all of the agents who became registered were select agents. So, in effect, that didn't matter. You had to refer a mutual fund customer to a registered agent, because that's --

THE COURT: You've gone the purview of my question.

MR. REICHLER: Thank you, Your Honor.

THE COURT: Mr. Garner, I'll give you two minutes, if you wish it, in rebuttal.

MR. GARNER: Well, thank you, Your Honor.

Let me just confine it to a couple of very brief points. And this may be redundant; and I apologize for that. But with respect to the point that there was a -- that the program, the partner agent program, had ended, I think all we need to do is look at Exhibit Number 91.

And again, the testimony about the conclusion of that program and the evidence was evidence that was sent to the field. It is extraordinary, I think, in looking at the evidence of this -- that was presented at this trial, that no AFE was called as a witness to testify to what happened at the AFE level, what was, in fact, communicated to the agents.

There's no regular course of business that was testified as to what was told to the agents. So when we're considering those 479 other e-mails, yes, the evidence is

within State Farm's knowledge. And we have nothing to show what it is. What -- and what happened there.

THE COURT: All right. Thank you, sir.

We're now going to consider the Select Agent Program.

MR. GARNER: I am happy to do that.

THE COURT: I'll hear you, sir.

MR. GARNER: Thank you, Your Honor.

CLOSING ARGUMENTS ON THE SELECT AGENT PROGRAM

MR. GARNER: Fortunately, under the Select Agent Program, most of the facts are not in dispute. The requirements and the benefits of the program are stipulated between the parties with what I will call, are a few tweaks.

THE COURT: Give me a moment, please.

MR. GARNER: Sure.

THE COURT: Yes, go ahead.

MR. GARNER: Okay. The principal tweak is that the agents testified that select agents could broker Phoenix Mutual products. These are high-end life insurance policies. That evidence was not contradicted by State Farm's witnesses. And if we look at Plaintiff's Exhibits 23 and 79, we see that the brokering of Phoenix Mutual products is a benefit of the select agent program. It is also not disputed that select agents do not get these benefits -- nonselect agents do not get these benefits.

One point in the testimony that I think bears some

clarification is that when Mr. Wright was on the stand, he testified at the beginning of his testimony about a number of award programs that the company had. There was a chairman's circle and a president's circle. He did not testify that those awards were available to all.

The agents testified that they -- under the old program before select agent -- they were eligible to get prizes and awards, but that under select agent, if they're not a select agent, they may not get prizes and awards that they earlier would have qualified for.

THE COURT: Well, don't all programs -- doesn't the evidence show that all the programs including the select agent program, are open to everyone?

MR. GARNER: Well, select agent is open to everyone. But if you're not a select agent, you may not otherwise qualify for the president's circle or the millionaire's club, whatever names that they give to these things, which agents could -- all agents could qualify for before the select agent program.

THE COURT: I'm not aware of any evidence to that effect.

MR. GARNER: Mr. Knapp testified that he, before the AA97, under the AA4, that he qualified for, and, in fact, did receive a number of awards. He signed the AA97 under the representation by the company that he would be able to make up the lower commission on enhanced award opportunities.

He says that the company then imposed the select agent program, which then encompassed all awards and that as a nonselect agent, he was no longer eligible to get those awards. I'll be happy to find it in the transcript and update the closing, if Your Honor wishes.

THE COURT: You may do that tomorrow.

MR. GARNER: Very well. Thank you.

There is an issue as to whether select agent creates a separate class of agent. Mr. Knapp testified that it does create a separate class of agent. If we look at Plaintiff's Exhibit 74, State Farm admits that the public may be confused by advertising select agent, because it creates multiple classes of agents.

Now, Mr. Wright, on the stand, did not contend that the Select Agent Program was necessarily simply a program of prizes and awards. He admitted that certain benefits were not prizes or awards, including brokering, referrals of Internet and other business, this also includes block assignments. These were benefits.

So we have a fact issue here that was brought up. Can all agents become select agents, or is there -- are there barriers? And secondly, a legal issue, or maybe a mixed fact in legal issue, if it's not a prize or award, can State Farm give these benefits to some agents and not others?

THE COURT: I must tell you, Mr. Garner, as a fact-finder, I'm not persuaded by a witness stating a

conclusion, such as Mr. Knapp saying that the select agent program did create a separate class of agent. What I'm interested in is -- are the underlying facts from which I'll draw the conclusion.

And you state some of the underlying facts. To me, that's going to be the determining factor. And I mentioned that because you're going to submit proposed findings. And I think both sides would be well-advised to -- to use conclusions such as the program was voluntary, as a conclusion drawn from concrete factual evidence.

MR. GARNER: I understand, Your Honor, and I appreciate that direction.

THE COURT: And that's going to be very important in regard to the question of whether the -- under the topic of Partner Agent Program, of which embraces the RRRD as well. I'm concerned about the particulars.

MR. GARNER: Absolutely, Your Honor.

May I proceed?

THE COURT: Yes.

MR. GARNER: Okay. Let us look at this fact issue of whether all agents can fairly qualify.

If we go back to the Plaintiff's deposition excerpts, PSD, page 57, Mr. Fisher has testified that no studies were done to determine if all agents could qualify. The evidence focused on --

THE COURT: PSD is?

MR. GARNER: I used it to mean Plaintiff's Summary

of Deposition. It's really not a summary. It's our deposition excerpts that are in a -- in the book. And the --

THE COURT: All right. Proceed.

MR. GARNER: Okay. There were two criteria that we focused on, both of which are referred to by State Farm as qualify criteria. One was QRP, which I think Mr. Fisher testified was a combination of profitability and other factors. Mr. Knapp testified, as did Mr. Killingsworth, that agents with policyholders in economically disadvantaged areas would have difficulty reaching this level.

If we look at Defendant's Exhibit 38, this is a -- an e-mail reflecting a change from the QRP standard to the life-state sales standard. And it reflects that under the old standard, 106 agents were excluded. So we know from State Farm's own evidence, that under this standard, there were a number of agents who simply could not meet that criterion.

Under the new criterion, life sales, Mr. Knapp, who has policyholders in an economically disadvantaged area, East St. Louis, says agents with policyholders in those type of areas will have difficulty meeting this 80 percent persistency requirement, because those policyholders are not in a position to keep paying their life insurance premiums over a period of two years.

That was testimony that was not contradicted by

State Farm witnesses.

We also had testimony that the business plan varied from AFO to AFO. It's administered at the AFO level, so that in one AFO, a business plan may be a two-line document. In another AFO it may have to be a 20-page document. So there's no consistency in how that requirement is administered.

THE COURT: Wasn't there testimony that no agent seeking select agent status was denied that status on account of a failed business plan?

MR. GARNER: I think that is what the testimony was. Yes, Your Honor.

THE COURT: Well, how do I deal with that, Mr. Garner?

MR. GARNER: Well, let's go back to Mr. Knapp's testimony. He said he didn't want to submit a business plan because he didn't want to disclose some of the ways in which he got his customers, and he wasn't confident that that information --

THE COURT: Well, that's a decision that he made.

MR. GARNER: Right.

THE COURT: But with respect to the alleged arbitrariness in the administration of the business plan feature --

MR. GARNER: Yes, Your Honor.

THE COURT: -- how should I deal with that in the light of the testimony which I think is undisputed, that no

agent was ever denied select agent status on account of a faulty business plan?

MR. GARNER: Your Honor, what we don't know about are agents who may have been in AFOs where the requirements were too rigorous or onerous for them to even try, so.

THE COURT: Proceed, sir.

MR. GARNER: We have a legal issue here that I think was raised by Mr. Wright's testimony, and I'm just going to just touch on it briefly here. Can State Farm deny benefits to some agents that it gives to others? And Mr. Wright said, yes, we can because it's not in the contract.

But even if we do a cursory look at the contractual provisions, we have Section 1-C that says State Farm will provide materials and supplies. We have section 1-F that says it will advertise and participate in the costs of advertising in accordance with policies.

We have 1-G, fulfillment of the agreement is the agent's principal occupation. 1-L, State Farm reserves the right to prescribe policy forms. 2A, compensation is going to be in accordance with a schedule.

Now, either these provisions mean something and they are applied in an even-handed manner, or they don't.

So we conclude that the Select Agent Program discriminates between agents. It creates a separate class of agents. The contract means something -- one thing for some, and it means something different for others. We ask

for the remedy that State Farm cannot discriminate and has to treat all of its agents alike, and cannot hold some out as select to the public, while others are not.

Thank you.

THE COURT: Thank you, Mr. Garner.

Mr. Reichler?

MR. REICHLER: Thank you, Your Honor.

Your Honor, I believe the evidence shows that the Select Agent Program is a set of rewards and benefits that are over and above anything that State Farm has promised its agents in the agent's agreement. State Farm has offered these extra rewards and benefits to all agents, to all agents who do certain things over and above what the agent's agreement requires them to do.

Again, the offer is to all agents. And State Farm would be very happy if they all accepted this offer. The participation is voluntary in this sense. The agents are free to accept State Farm's offer and do the things that State Farm has made a condition for these extra rewards and benefits, or they are free not to.

Agents who do the things, CRC, licensed staff, production standards, agents who do these things in response to State Farm's offer are given the promised rewards and benefits. Agents who choose not to do them, still receive from State Farm, all the rewards and benefits that they're entitled to under the agent's agreement.

Now, the record shows that the rewards and

benefits under the select agent program, all of which have been stipulated to, were above and beyond what any agent was entitled to under the agent's agreement. Two of the rewards were free advertising, what they call co-op advertising and what they call Yellow Pages display advertising.

Now, section 1-F of the agent's agreement makes it clear that agents do not have a contractual entitlement to free advertising. Mr. Garner kind of ellipsed out some of the language. It doesn't say -- 1F doesn't say advertising will be paid for according to policies determined from time to time. It says, will be determined by us, meaning the company, according to policies that we determine from time to time. Very clearly, the contract left to the discretion of State Farm whether and to what extent to pay for any agent's advertising.

Three of the rewards or benefits involved the assignment of business from Internet sales or block assignment or referral of customers -- referral of mutual fund customers. There were six rewards or benefits listed in the stipulation. Two had to do with advertising, three had to do with assignment of business. There is nothing in the agent's agreement that entitles agents to receive assigned business or customer referrals. They're entitled to the benefits of personally produced business, but there is nothing in the contract that gives them the right to have business assigned to them by the company.

In fact, Mr. Mueller, Plaintiff's witness, testified exactly to this at the trial. We don't have the transcript from that day, but it was in the Internet sales discussion. Mr. Mueller agreed that the -- that agents do not have the right to any assigned business, whether from block assignments or Internet sales, and that the company is free to assign block assignments or refer Internet business to agents or not, or to whom at its discretion.

That's their own witness saying that. And all of State Farm's witnesses confirmed that.

THE COURT: Mr. Reichler, assuming arguendo that the company does have that power, would it nevertheless be a power that must be exercised consistent with the implied covenant of good faith?

MR. REICHLER: Yes, I agree. It has to be done in good faith, Your Honor.

And by making these programs available to all agents and by setting standards for them that are reasonable and relatively easily achievable by all of them, as of now 76 percent of State Farm agents have met the criteria.

And it's been that way since the beginning of the program in 2000. It's always been at least 70 to 75 percent of the agents have qualified. State Farm would love 100 percent to qualify. It's an inclusive program; that was the testimony.

They want it to be inclusive. They would love for

Mr. Knapp and others to submit a business plan, have it rubber stamped, and be a select agent and get all of the -- all of the rewards and benefits. So it's certainly administered reasonably and in good faith.

Now, the only witness who Plaintiff called -- Plaintiff called only one witness at trial on this, and that was Mr. Knapp. And what did he complain of? He complained that he was denied free advertising, especially in the Yellow Pages, as well as bonuses that he had previously received. I think it's significant Mr. Knapp did not complain about not getting block assignments, assigned Internet business, or customer referrals. And he was their only business.

So that part of the case is unchallenged. Whatever their position may be theoretically, they haven't put any evidence in challenging. In fact, Mr. Mueller admitted it's the company's right to assign business as it sees fit, of course, in good faith, as I've indicated.

Now, Mr. Knapp's complaint about not getting free advertising, free Yellow Pages listing, the evidence is that he can get a subsidized Yellow Pages listing. He can get some of it paid for by the company. But again, under 1-F, he's not entitled to that. It's up to the company.

Similarly, his testimony that before the Select Agent Program he qualified for certain bonuses, after it, he didn't. Well, according to 2-C in AA3 and AA4, or 2-D in AA97, the company reserves for itself the right to set

bonuses, to set the conditions, to change the conditions. So if the company changed the standards or changed the conditions for giving bonuses from one year to the next, Mr. Knapp has no legitimate complaint.

And, in fact, as we've said, Mr. Knapp could have been a select agent. All he had to do is submit a business plan. The evidence is, as Your Honor has correctly said, no one who submitted a business plan has ever had it rejected or failed to become a select agent because of the business plan criteria. All he had to do was submit it.

If he isn't a select agent, if he isn't getting free advertising, if he isn't getting the bonuses that select agents get --

THE REPORTER: I can't get it.

THE COURT: You'd better slow down.

MR. REICHLER: If he isn't a select agent, if he isn't getting the bonuses that select agents get, if he isn't getting the free advertising that select agents get, it's because he chose not to submit a business plan. The company practically -- well, editorialize.

He didn't. It was his choice. He testified it was his choice, whatever his reason, that's his reason. He has nothing to complain about.

Now, I want to make one -- just two points, very quickly, Your Honor.

They have suggested -- Mr. Garner has suggested that there's something discriminatory about the criteria

that were used in the select agent. Well, we have submitted statistical evidence in response to Your Honor's request, Defendant's Exhibit 78, which completely refutes this. It shows that whether you look at agents by race or by geographic location, they all -- the percentage of African American or Hispanic agents who are select agents, or city agents, or metro agents -- or metro located, or suburban or rural, it's all very consistent with the 75, 76 percent standard.

D-38, which reflects the change when profitability, in January of 2004, ceased to be a factor in determining select agents, Mr. Garner is right. It shows that 106 agents then qualified. It doesn't say where they came from. But it says 106 agents who weren't qualified all of a sudden were qualified. That's less than one percent of the agents.

So regardless of who they were, it's not a statistically significant number. But the fact is that State Farm dropped profitability as a criterion, so it could make the program more inclusive, and these 106 could become select agents.

My last point is this, Your Honor, the Plaintiffs, in focusing on this distinction between rewards and benefits, we say, whether you call it a reward or a benefit, the company has the right to offer something over and beyond what it's obligated to offer under the contract. That's what we're talking about, whether it's called a

reward or benefit.

This is not a collective bargaining agreement, as they would have it. This is not a Labor Law issue. These people, these agents, are not employees. They are independent contractors. They don't all come under one contract that's signed with a union. There is no union. This is -- they all have their own separately signed agreements. They're subject to the laws of 50 different states, wherever these people operate. This is not a collective bargaining agreement.

And finally, there is nothing in the law that prevents State Farm from offering special rewards and benefits over and above what the independent contractor agent's own contract requires, for performance of tasks by the independent contractor, over and above those that his contract obligates him to perform.

And I would cite the Court to the restatement second of agency. And this is something that we've found since our brief, Your Honor, so it is a new citation.

The restatement second of agency, Section 434, Comment B, says that, although a contract may prohibit a principle from quote, interfering, quote, with the success of one of his agents, quote -- and this is, we submit, quite on point -- quote, He, the principal, is privileged to assist another of them in making a sale and has no duty to act impartially among them." Principal has no duty to act impartially among his agents.

Now, State Farm believes it is acting impartially among its agents, because it is offering these rewards and benefits above what the contract requires to all of them. It is set criteria that they can all meet; they're reasonable; they have business purposes.

Clearly, there's no evidence that they are in bad faith. And State Farm has adopted an inclusive program that encourages every agent to participate. And if somebody opts out, if there is a selectivity here, it's really the agent who selects to keep himself out of the program. And State Farm cannot be faulted for that.

Thank you, Your Honor.

THE COURT: Two minutes in rebuttal, Mr. Garner.

MR. GARNER: Thank you, Your Honor.

I want to clarify one point that I thought I heard Mr. Reichler say. It might have just been the way the sentence was constructed.

He suggested at the outset that the select agent program encompassed rewards and benefits above and beyond what the contract requires, which was stipulated to by the parties.

MR. REICHLER: The rewards and benefits were stipulated.

MR. GARNER: The rewards and benefits were stipulated. I want it to be clear that the parties did not stipulate that they were above and beyond the contract. We don't agree with that.

Just a couple of other points.

Mr. Reichler talked about the statistical data that was submitted in Defendant's 78. That data had to do with agents. And as Mr. Killingsworth pointed out, and as I pointed out on my cross, I think, of Mr. Fisher, that data had nothing do with the demographic characteristics of the policyholders. And that is what Mr. Knapp had -- and Mr. Killingsworth had testified about.

And also the statistical, Mr. Fisher was not familiar enough with the way that the document had been prepared, to even state that he knew where in the categories his hometown of Bloomington, Illinois, would fall.

That's all I have by way of rebuttal.

THE COURT: All right. Mr. Garner, I'll hear you on restrictions on sales.

MR. GARNER: Thank you, Your Honor.

CLOSING ARGUMENTS ON RESTRICTIONS ON SALES

MR. GARNER: On restrictions, the agent's agreement has provisions in it that we feel are relevant. The preamble says that the agent is best able to sell insurance. 1-A says the agent is appointed to sell. 1-G says it will be his full-time occupation.

Mr. Swift testified that he was always told to sell as much as possible, that this was consistent through his 35 years as an agent. And that wasn't contradicted by State Farm. He testified that prior to the year 2000 that

there were restrictions only in the case of natural disasters.

The restrictions, Point 3, these restrictions meaning those after the year 2000, were occasioned by stock market losses. There was also testimony on -- on the cross of State Farm's witnesses, that the restrictions, after 2000, were occasioned by the company's growth under the big dog is off the porch. And I think it was Mr. Fisher who testified that that was a foreseeable loss.

He testified, Number 1, that it's always new policies that occasion the highest rate of claims. And two, the company starting in the late 1990s, had a very aggressive program of growth, and therefore losses were foreseeable.

He also testified on cross that at that time the company was launching the mutual fund sales and its bank, to other ventures that also lost money. And those were foreseeable losses.

Mr. Swift testified, and I don't think that there was any contradiction to it, that there were other ways that the company could deal with these losses, such as raising deductibles, raising rates, or imposing exclusions. If we look at the evidence -- or Mr. Swift also testified that his income was down over the long-term, and that his policy count was down.

One of the interesting aspects of this that I want to call the Court's attention to briefly, is the issue of

what contractual authority there is under the contract for the company to stop selling insurance. In the AA3 and AA4 contracts, Plaintiff's Exhibit 1 and 2, it says, "The company may prescribe rules governing the binding, acceptance, renewal, rejection, or cancellation of risks."

And Mr. Swift said that that was used for individual policy decisions. Individual policy decisions, so, yes. We will accept this applicant. We will reject that applicant because the history of risk is too high. That wasn't contradicted.

The AA97 adds some additional language to the same provision. And it says, "The company may prescribe limitations on the submission of applications by individuals agents, by market area, by line of coverage, by policy type, by company, or by any other means.

So we agree. The language in the AA97 appears to be directed toward the power of the company to stop selling by area, by company, by other means. That language does not appear in the AA3 or 4.

So we say there is no authority under the AA3 or 4 to impose restrictions across the board, particularly when it's foreseeable and within the company's power to manage its own internal affairs. Under the AA97, it is our contention that this language must be used reasonably, that the power under that language must be used reasonably.

That, by the way, Your Honor, is Section 1-L.

We have some documents I'd briefly like to call the Court's attention to. Plaintiff's Exhibit 39 and 40 are summaries of the restrictions. Plaintiff's Exhibit 41, if you look at it closely, it shows that over the period in the early 2000s, premiums increased, but the number of policies decreased on a company-wide basis.

Forty-two shows that average books of business of agents were down or level from 2001 to 2002. And 43 shows that the lapse in cancellation rate across the country varies from roughly 10 to 15 percent. You recall Mr. Swift testified he had a lapse ratio of about 15 percent. So that if restrictions were so that he had to sell 15 percent new policies simply to stay -- simply to tread water. So that if restrictions were imposed, he had a risk of losing a substantial amount of business.

In this area, State Farm's testimony is contradictory and not probative. We've got a comparison here between the evidence at trial and the evidence that was given at depositions.

First of all, where is the decision made to impose restrictions? Mr. Trosino, the COO of State Farm says it's made at headquarters. This is in our deposition excerpts at page 41. At trial, Mr. Wright says it's a cooperative decision between headquarters and the zone. Mr. Thomas, in his deposition, testified it was at the zone level. That's on our summary at 43.

Next question: Is there a procedure that the

company follows in determining how to impose restrictions? At trial Mr. Wright said, yes, the zone proposes restrictions in writing, and headquarters approves. For deposition purposes, State Farm proffered a witness with knowledge to testify on this subject. The witness was Mary Bitzer. She was a zone manager from, I think it was the central zone, middle part of the country. We took the deposition in St. Louis.

And she, the designated witness with knowledge of restrictions, said, quote, There is no procedure. That's on pages 45 and appears again on 46 of our deposition summary. Are, I should say, they're documents that reflect the decision-making process? No. That's on page 48.

Is there a standard? I asked Mr. Wright at trial. Yes. He talked about profitability targets. Your Honor, it was the first time I had heard that concept.

I asked him, is there a standard or criterion for determining when to restrict sales? He said, yes. If someone said there was -- I asked him, if someone said there was no standard of criterion, would that be incorrect? He said, yes, that would be incorrect. I've got a question mark here that doesn't belong there.

But Ms. Bitzer says there's no set standard or criterion. That's at pages 48 and 49 of our deposition summary.

Is there agent input? Mr. Wright, at trial, says, yes, we get input from the agents. Ms. Bitzer says she

looks at nothing that pertains to agents. There is no agent input. There's no discussions of agent compensation. That's at page 49.

So what we say is the restrictions are not applied in good faith, haven't been applied in good faith in this instance. Our witnesses testified they were concerned there is a risk that this will be repeated in the future.

We want a declaration under the contract, State Farm has to make all lines available to all agents unless for good cause shown, based upon factors beyond State Farm's control and taking account the interests and the profitability of the agents.

Any questions, Your Honor?

THE COURT: No. Thank you, Mr. Garner.

Mr. Reichler?

MR. REICHLER: Thank you, Your Honor. I should be briefer than on the other points.

First of all, I believe that Mr. Garner has made representations about the facts in his closing argument which go directly against the stipulations in this case. It is stipulated that State Farm has historically managed risk by establishing underwriting criteria and imposing limitations on the number of new policies that agents may produce. Those are trial stipulations 40 and 42.

It's also stipulated that State Farm has imposed such limitations not only on a policy-by-policy basis, but on a general basis, in response to unforeseen or

unforeseeable events like natural catastrophes and economic or financial downturns. That's stipulation Number 43.

Now, Mr. Garner said in his closing that Mr. Swift testified that he was always told to sell as much as possible, and he was -- and that the only time limitations were applied was on a policy-by-policy basis, individual policy basis.

My good friend and my absolutely esteemed opponent is simply wrong about that. Mr. Swift admitted, and notably, Mr. Garner didn't cite you to the transcript when he told you about Mr. Swift's testimony. I will.

July 27, 2005, Mr. Swift testimony at transcript 280, 281. He admitted that State Farm has, in fact, as a general matter, instructed agents restricted agents in writing entire lines of business, not just on a policy-by-policy basis. Particularly, he testified that in the mid 1990s, State Farm told him and, of course, other agents as well, not to write any more commercial insurance policies insuring apartment buildings because it was losing money on that.

That wasn't a policy-by-policy -- policy-by-policyholder. It was an entire line of business in the mid 1990s. They stopped writing. They told the agents not to do it anymore. Mr. Swift agreed that it is in State Farm's -- he was their only witness on this subject, Your Honor -- that it's in State Farm's and the agent's mutual interest to maintain the company's

operations on a profitable basis.

And it's undisputed that State Farm suffered unprecedented financial losses, more than eight billion dollars in 2000/2001, including billions of dollars of losses on the sale of new insurance policies, which lead directly to the imposition of the restrictions on new sales at issue in this case.

Now, there is law on this one, Your Honor. There is established case law, under all three forms of the agent's agreement.

Mr. Garner attempted to draw a distinction between the company's ability to impose these restrictions under the AA3 or 4 on the one hand, and the AA97 on the other. But there are three cases decided under the AA3, 4 contracts, not the AA97, which have held specifically that State Farm has the power to impose restrictions across the board by region, by type of insurance, by market area, in the circumstances where the business so justifies. And that is the Hartman case in Florida.

THE COURT: That involved State Farm?

MR. REICHLER: Yes. Hartman vs. State Farm. I'm sorry, Your Honor.

THE COURT: And which contract was involved?

MR. REICHLER: It was either AA3 or AA4. They're identical, Your Honor. But it's not the AA97, which has the expanded language.

THE COURT: Yes?

MR. REICHLER: The Hemmonds case, I believe that's H-E-M-M-O-N-D-S, also versus State Farm.

THE COURT: Spell that again.

MR. REICHLER: I believe it's -- I'm sorry?

MR. MARTIN: H-E-M-M-A-N-S.

MR. REICHLER: H-E-M-M-A-N-S. I'm sorry, Your Honor. That's in Louisiana, also against State Farm.

THE COURT: And who is the appellee in that case, Hemmans against -- give me the full cite.

MR. REICHLER: I will -- Your Honor --

THE COURT: Is that in your --

MR. REICHLER: It's in our brief, yes. That case is in our brief, as is the Hartman case. You'll find it in our briefs on summary judgment, Hemmans vs. State Farm. It's a Louisiana State Court case.

THE COURT: And the contract?

MR. REICHLER: It's either AA3 or AA4, Your Honor. It's not the AA97.

THE COURT: All right.

MR. REICHLER: And then we found --

THE COURT: Apple -- be?

MR. REICHLER: Well, I'm coming to that, Your Honor.

We found another case which is an unreported decision. But I've furnished a copy to Mr. Garner; I have copies for the Court. It's called Jessen, J-E-S-S-E-N vs. State Farm, decided by the Illinois Court of Appeals in

1997.

And the holding in the case, Your Honor, is that there was no breach of contract or breach of the implied covenant of good faith and fair dealing, where as a result of quote, significant losses, State Farm, quote, restricted Plaintiff from writing any new automobile insurance during the period June 1, 1985 to June 1, 1986."

Under paragraph 1-L, the Court held the agent's agreement expressly authorized State Farm to --

THE COURT: What contract is that?

MR. REICHLER: Well, your Honor, this is 1985 to 1986, when the restrictions were in effect.

THE COURT: So it's three and four again?

MR. REICHLER: Three and four again, yeah. Because it's 10 years before the 97 came into effect.

THE COURT: All right.

MR. REICHLER: And then, of course, we have the Appling case, which, Your Honor, always a step ahead of me, got two ahead of me -- and the Appling case is a decision by the United States Court of Appeals for the 9th Circuit, as Your Honor is aware, finding that -- Your Honor will hear it again when we get to brokering.

But it also -- it upheld State Farm's across the board restrictions on certain products imposed because of profitability considerations, that is, losses. So the restrictions that were imposed, and that were the subject of the Appling case, again, not on a policy-by-policy

basis, but on an across-the-board basis, were upheld.

THE COURT: What contracts were involved?

MR. REICHLER: In that case, Your Honor, all three contracts were involved. And, in fact, the Court -- the Court went on to hold that even though there is additional language in the AA97 agreement, it was immaterial because all of the contracts covered the restrictions. And the Court held that the additional language was really just clarification, that State Farm already had the rights under the AA3 and 4, to impose these restrictions, and the AA97 merely elaborated on that. That's the holding of the 9th circuit.

Now, given the authority -- the obvious authority of State Farm to impose these restrictions in these circumstances, this boils down to the question of whether State Farm exercised its right in bad faith. Bad faith is the test here.

Now, Mr. Wright -- Your Honor heard Mr. Wright. Your Honor can evaluate that testimony. I would be happy to supply tomorrow, if the Court wishes, the exact transcript page cites. But Mr. Wright was questioned at great length, both by myself and Mr. Garner, about the process that was followed in establishing these restrictions, deciding on them, and the criteria that were used.

Mr. Garner tries to create some sort of conflict between Mr. Wright's testimony and that of Mr. Bitzer in

her deposition. I think it's only fair that I take one minute and read from Mr. Garner's own deposition excerpts from Ms. Bitzer's deposition. Because I believe he read selectively from Ms. Bitzer's deposition testimony in his closing argument, and, in fact, created an impression which isn't fully accurate.

If I may have one minute just to show what else --

THE COURT: You have one minute.

MR. REICHLER: All right. This is quoting from her.

"Q How do you know or how does your team know when to approach the decision-making -- then to approach the decision-making process at all?

"A As I said, we look at a variety of factors. We look at profitability of our product. We look at the growth of our product. We look at the cost of doing business in the market. We look at investment issues, whether we're making a profit in that particular market area as an example.

"Q Could you describe the process step by step, from beginning to end?

"A I won't be exact in this description. We have steps that we look at, but it is not an exact process. I can describe it to you as best I can. We look at a number of reports, as I've said. We have conversations with our underwriting and actuary

partners in corporate. We have conversations among ourselves. We look at the business environment in the marketplace. We look at the regulatory environment.

There are a number of factors that we take a look at. We look at reports, and as we weight the pros and cons of all of those factors and we, come to a decision about a market and product in the area.

Okay. And how do you know take into account the interests of State Farm agents?

"A By talking about how it might affect them. I think I stated it earlier, we talk in general about how this might affect State Farm agents.

MR. REICHLER: Your Honor, obviously, if State Farm, which is in the business of selling insurance, is going to make a decision at certain times to stop selling insurance, that's clearly something that the company is going to pay careful attention to; it's only going to do it in circumstances when it's absolutely necessary; and it's going to apply those criteria that it deems appropriate for establishing these particular restrictions.

THE COURT: Thank you, Mr. Reichler.

MR. REICHLER: Thank you, Your Honor.

THE COURT: Rebuttal, Mr. Garner. Two minutes, if you wish.

MR. GARNER: Very briefly, Your Honor.

I don't have those cases in front of me. My recollection is that they dealt with natural disasters. We

could address that issue in a supplemental brief or in the findings and conclusions.

What would Your Honor's preference be? In fact, I think --

THE COURT: Well, you're going to have that opportunity.

MR. GARNER: So we'll take it in the findings and conclusions. I do notice, however, that the Jessen case that Mr. Reichler handed up -- and it is distinguishable on its face -- it says, "In 1985, as a result of significant losses incurred by State Farm, on Plaintiff's policyholders," the agent's policyholders.

This is not a statewide restriction. This is a restrictions on a particular agent, with respect to losses that that agent's policyholders had incurred. So it is distinguishable.

As far as Ms. Bitzer's testimony, it is in the record. We commend Your Honor to reading it in its entirety next to Mr. Wright's testimony.

And that's all I have at this time.

THE COURT: Thank you, sir. You may -- you may deliver your closing argument on brokering.

MR. GARNER: Very well, thank you.

CLOSING ARGUMENTS ON BROKERING

MR. GARNER: On the issue of brokering, the agent's agreement contemplates that the company -- that there is consent that the company will give. That's in

Paragraph 1-G.

Mr. Swift testified that what the agents want here is the temporary authority to broker when State Farm is not offering products so that they can keep the business for State Farm.

Mr. Mueller was -- testified that he was told by Mr. Whitney that he would never be able to broker for anyone. Both Mr. Swift and Mr. Mueller testified that there were other companies that allow brokering, that they're including companies with captive agents, such as Allstate and Nationwide, and that this is not a problem.

The question then is, there appears to be some discretion in the contract to permit brokering. And the issue is whether it is exercised reasonably and in good faith. Now, Ms. Bitzer testified that the company, in fact, deals in good faith with agents. That's in Plaintiff's deposition excerpts at 34. I'll represent that Mr. Fisher also said it, but I don't have a reference right now.

Written denials to the agent's requests, which are found at Plaintiff's Exhibit 45, have typically enumerated seven to nine factors that they say the company takes into account. In his deposition, Mr. Fisher said there really hadn't been any study to show that these factors made a difference. That's at pages 37 to 39 of our deposition excerpts.

Mr. Whitney was called to the stand at trial as

a -- an impeachment witness. And he testified that he had never told Mr. Mueller that Mr. Mueller couldn't broker any kind of -- would never be allowed to broker are kind of insurance. But what he said was essentially, no one could broker. That the agents cannot broker with any company in competition in any line. And anyone offering fire insurance is in competition.

The substance of Mr. Whitney's understanding of the brokering policy was consistent with what Mr. Mueller said he had been told. That if it was fire insurance that Mr. Mueller was looking to broker, he'd never be able to broker with anyone, because anyone offering fire insurance is in competition, and anyone in competition is not a candidate for brokering. It's in the transcript at 200 and 204.

Mr. Fisher testified that there were, in fact, three factors that the company looked to. State Farm was in that market, if it had no plans to enter or re-enter that market, and if State Farm did not feel it was competing. These were the factors that drove the decision.

If we go back to Plaintiff's Exhibit 45, where there are written denials, we don't find these factors; we find a number of other factors. But this is what controls the decision. The agents have never been told that.

We think the facts warrant a conclusion that State Farm is not exercising its discretion in good faith,

because, among other things, it hasn't told the agents what the policy is. Either the contract provision -- and State Farm drafted the contract here -- means something and it has to be exercised in good faith, or it doesn't.

And the remedy should be a declaration that State Farm must permit brokering of products of companies that are not full line when State Farm temporarily suspends the sale of that type of insurance.

THE COURT: Thank you, sir.

MR. GARNER: Thank you, Your Honor.

THE COURT: Mr. Reichler?

MR. REICHLER: Thank you, Your Honor.

THE COURT: Mr. Reichler, before you begin, may I ask you whether State Farm continues to take the position urged in the summary judgment brief, wherein it claimed the absolute discretion and the -- that it need have no reason whatsoever to deny consent? I believe that was on pages 90 to 91 of the brief.

Is State Farm's position now as expansive as that it would, in effect, I think, remove it from the good faith obligation?

MR. REICHLER: Your Honor, the answer is: It depends on the state. There are some -- as Your Honor knows, these contracts are construed. These agent's agreements are construed according to the state laws of the states in which the agents operate.

There are some states in which there is -- they --

that reject the concept of an implied covenant of good faith and fair dealing. In those states, it's the language of the contract, and that's it.

THE COURT: State Farm didn't qualify that statement in the brief.

MR. REICHLER: I am qualifying it now, Your Honor.

And my answer is, that in those states where there is an implied covenant of good faith and fair dealing, of course, State Farm would not be permitted to act in bad faith. Now, in practice -- does that answer Your Honor's question?

THE COURT: Yes, it does.

You may proceed.

MR. REICHLER: Thank you.

And in this case, I might say, we are addressing the issue of good faith, bad faith. So we're -- and I will address it in just one moment. Let me first state the premise, however.

The starting point of my presentation of my closing argument on this issue, Your Honor, is that the agent's agreement, Section 1-G prohibits broking for other insurance companies unless State Farm consents. Now, Plaintiff's witnesses agree with that.

Mr. Knapp, in his deposition, page 48, lines 3 to 7, Mr. Mueller in his deposition, page 93, lines 15 to 19, agree with that statement. Those are in our deposition

excerpts and they're part of record.

So State Farm has the right to prohibit its agents from brokering for other insurance companies, even when it restricts the number of new policies they can sell. And that is, in fact, the holding of the Appling case that we referred to a moment ago, under the subject of restrictions in the 9th Circuit, 2003.

The Appling case dealt with a situation where the -- the no brokering policy was challenged in the context of the existence of restrictions on writing new business. And the Court -- district court and the Court of Appeals said that even with restrictions in place, State Farm can enforce the no brokering policy.

So the issue -- and I'm referring to the one that concerns Your Honor, is not whether State Farm lacks the right to deny brokering requests, but whether in this case, in this jurisdiction, it has exercised that right in bad faith.

There is no evidence of bad faith by State Farm. The evidence shows that the company has a reasonable policy on brokering and that it has applied that policy consistently. The policy is, the company which has made an enormous investment in the training of its agents, does not permit them to broker for competitors of State Farm.

The justification for this policy is self-evident. Many companies have exclusive agents. State Farm is not the only one. And exclusive agents are exclusive agents.

They write business only for the company they represent.

Mr. Fisher in any event, set forth the business reasons in support of this policy at great length, at the trial. I will not repeat them here, but I will refer the Court to the transcript of July 27th, pages 207, line 1, through 211, line 24.

Now, neither the policy of no brokering for competitors, nor the reasons have been challenged by the Plaintiffs in this case. Nor has the Plaintiff identified a single occasion when State Farm has deviated from this policy or applied it in an inconsistent manner.

In those rare cases when State Farm authorized agents to broker business for other insurers, it was because, A, the other insurer was found not to be competing with State Farm, as is the case of Baldwin Mutual, where they are offering the type of policy that State Farm didn't market and had no interest in marketing. Or the other insurer was in a business alliance with State Farm, like AON or Phoenix Life, and there was an agreement between State Farm and that company to jointly market products together.

The Plaintiff's witnesses agreed -- they agreed that it was reasonable for State Farm to deny a request to broker for State Farm's competitors. And I would refer the Court to Mr. Mueller's testimony at the trial, July 27th, page 158, lines 4 to 12. And also to the deposition testimony of Mr. Adams, another board member of NASFA who

was not called to testify at trial by them. His deposition excerpt is in the record, page 86, lines 14 to 20 -- agreed that it is reasonable for State Farm to deny requests to broker business for competitors of State Farm.

Now, in this case we have heard about two requests to broker that were denied by State Farm by Mr. Swift and Mr. Mueller. Mr. Swift admitted -- his letter, by the way, requesting permission to broker, is exhibit D-79. It specifically asks that all State Farm agents be permitted to broker business for all other insurance companies. And he confirmed that at the deposition, and he confirmed that at the trial. And that is July 27, pages 136, line 20, to 137 line 11.

His letter requested permission from State Farm for all State Farm agents to broker business for all and other insurance companies. He admitted specifically, that this included State Farm's competitors, an admission that takes him right into the -- into what his colleagues from NASFA said, it's unreasonable -- or it is reasonable for State Farm to deny requests to write business for competitors.

That leaves us with Mr. Mueller. Mr. Mueller admitted that his letter, which was addressed to State Farm requesting permission to broker. And that's exhibit P92 -- that his letter requested permission to broker fire insurance business for any other insurance company. I asked him on cross-examination. Now, if State Farm had

just said yes to your request, would that have given you permission to write fire insurance business for any other company, including competitors of State Farm? And he said, yes.

So again, his written request was for permission to write business for State Farm's competitors, which he, himself testified would be reasonable for State Farm to deny.

Now, he did say -- he did offer testimony here which contradicted his written request. He said -- in a telephone conversation with Mr. Whitney, he said he mentioned two companies, Northern Neck and Loudon Mutual, which he contended were not competitors of State Farm. But that was inconsistent with his letter and it was also flatly contradicted by Mr. Whitney's testimony, who said, Mr. Mueller never mentioned those companies to me.

Now, it clearly can't sustain a burden of proof on that -- on that evidence that he ever even mentioned Northern Neck or Loudon Mutual.

THE COURT: Well, if I believe Mueller and not Whitney --

MR. REICHLER: Well, Your Honor, in that case, I have this to say. One, he testified on redirect -- and Your Honor can find this in the transcript of July 27, page 186, line 6 to 14. He testified that when he -- what he said to Mr. Whitney was, again, denied by Mr. Whitney. But what he said was: I told -- I asked Mr. Whitney if I would

write business for companies such as Northern Neck and Loudon Mutual, such as. In other words, by way of example.

So even if one were to believe his testimony, it was not limited to Loudon County -- or Loudon Mutual or Northern Neck.

And finally, at the time that Mr. Whitney denied this request, his testimony is that he was aware -- in fact, this was in response to Your Honor's questions. At the time he denied Mr. Mueller's request to broker, which was in late October, 2002, as the Court will recall. The record shows it's undisputed that the restrictions on writing fire insurance in Virginia went into effect in late August, 2002. And they were taken off in mid-December, 2002. So it's approximately four months that they were in effect. Mr. Mueller's request was at the end of October. So within two months of the end of the restrictions.

Mr. Whitney testified that he was aware, based on existing trends, that State Farm was very likely to resume selling fire insurance in Virginia before the end of the year, which would have been less than two months away, which is exactly what happened. That's the trial transcript of July 27, pages 204, line 11, to 205, line 6.

On this record, Your Honor, we submit that there would be no basis for finding that Mr. Whitney acted in bad faith or that State Farm acted in bad faith in denying

Mr. Mueller's request to broker business.

THE COURT: Thank you, Mr. Reichler.

Two minutes on rebuttal, and then we'll take the mid-morning recess. Mr. Garner?

MR. GARNER: Thank you, Your Honor.

Mr. Reichler raised an interesting point about choice of law. We may want to address that in the findings of fact, because I do think it's kind of important.

The AA97 has a choice of law provision that says the agreement -- this is section 6-E, "The validity enforceability, and interpretation of this agreement shall be construed according to the laws of the State of Illinois."

And we know that Illinois has an implied covenant of good faith and fair dealing. That's under the Diane case and the Interim Health case, both of which are in our summary judgment brief and our supplemental memos.

The AA3 and AA agreements do not have expressed choice of law provisions. And I frankly don't know, standing here, whether those agreements have been construed under various state laws or whether the courts have made a choice of law determination, for example, that the contract was made in Illinois, and therefore Illinois law governs.

So we'd like to look into it. It is an interesting question about the applicability of good faith.

THE COURT: Very well.

MR. GARNER: The -- a couple of points.

Mr. Reichler testified that Mr. Mueller -- I'm sorry. Mr. Reichler stated that Mr. Mueller had agreed that it was reasonable for State Farm not to allow brokering with competitors, and cited page 158 of the July 27th transcript. And what Mr. Mueller testifies to there is that it would be reasonable for State Farm to refuse consent to brokering for competitors like Allstate or Nationwide.

And I want to be clear that we're not asking to have permission to broker with full-line competitors like Allstate or Nationwide. But that's what the testimony was there.

And Mr. Whitney, I haven't had a chance to look at his testimony completely, but I do recall pretty clearly that although he may have been aware that there were straws in the wind, indicating that State Farm would resume selling this, he didn't know when it was going to happen.

I have nothing further.

THE COURT: We will stand in recess until 11:00 o'clock.

(Whereupon a recess was taken from 10:45 a.m. until 11:00 p.m.)

THE COURT: Mr. Garner, I'll hear you on the subject of mandatory meetings --

MR. GARNER: Thank you, Your Honor.

THE COURT: -- which is our last subject matter.

MR. GARNER: I would be brief.

CLOSING ARGUMENTS ON MANDATORY MEETINGS

MR. GARNER: The agent's agreement, in Section 1-B says that the agent is an independent contractor for all purposes. You have full control of your daily activities. In the preamble, it says, we, State Farm, do not seek and will not assert control of your daily activities.

State Farm drafted the agreement. State Farm had the opportunity to create exceptions and make that a bargain for issue at the time that the agent was invited to sign the agreement. But there aren't exceptions.

Mr. Knapp testified, agents are required to attend a yearly compliance meeting. The meeting, in fact, is not fully about compliance. There are new products and other things discussed, and the agents did -- Mr. Knapp did testify that other means exist to deliver this kind of information; home study or internet courses.

So we conclude the mandatory meetings requiring agents to attend a meeting, on pain of termination, does violate the contract, and we seek a declaration that agents do not have to attend those meetings.

I have nothing further.

THE COURT: Thank you, sir.

Mr. Reichler.

MR. REICHLER: Thank you, Your Honor. The material facts on this issue aren't in dispute. State Farm requires agents to attend only one meeting a year. It covers an agent's ethical and legal obligations; it last

half a day, and it takes place in the agent's local AFO. If an agent can't make the meeting for illness or other valid reason, the company arranges an opportunity for the agent to attend the meeting on another date at another nearby AFO.

For the last seven years, every State Farm agent has attended this meeting every year. Now, the reasonableness of this requirement, and I'll come to the legality in my conclusion, Your Honor. But the reasonableness of the requirement really cannot seriously be disputed, especially after the trial testimony.

Mr. Wright testified at some length about the origins of the requirement and the necessity and why it's important for agents to be -- receive the information on their ethical and legal obligations, which change from year to year; subjects like money laundering and identity theft, and privacy. These are subjects that need to be addressed.

Now, Mr. Wright also testified as to why this needed to be an interactive process, why the agents needed to be present. Because they learned from each other, among other things. Also, it's the only way the company -- or the best way the company can be sure that agents are there and listening and participating, and this information is imparted directly to them.

Now, I think the need for such a meeting, the appropriateness of such a meeting -- I'll come to the

legality in a few moments -- is self-evident, but especially after Mr. Knapp's testimony on Friday. Mr. Knapp, who was Plaintiff's only witness on this subject, agreed that, quote, insurance as close-oriented business, that, quote, State Farm and the agents must deal equitably with policyholders as to rates and claims, be trustworthy in handling money, avoid false advertising and unfair practices, and refrain from any action that would result in violation by State Farm or any agent of any applicable law or regulation.

He also agreed that, quote, agents need to be aware of the applicable laws and regulations and the applicable ethical standards. And he also agreed that agents, quote, need to be aware of any changes in the applicable laws regulation or standards.

But then, Your Honor, 0and it wasn't pretty -- he was all over the place when I asked him how State Farm could assure that agents were fulfilling their contractual duty to beware of their ethical and legal obligations. First he agreed with Mr. Garner's statement to the Court, which I read to him, that instead of requiring agents to attend a meeting, quote, they could test them. But then he disagreed. And then in other questioning from the Court, he agreed, and then finally he disagreed again.

During the portion of the testimony when he agreed that State Farm could test the agents, via the internet he said, he insisted that State Farm had no business requiring

agents to pass a test on ethics. They could be tested, but State Farm couldn't require them to pass the test. Then he said that State Farm had no business even finding out how the agent performed on the test. Then he testified that the only thing that company can do is send the agents written materials on ethics and legal obligations. But he insisted that agents are under no legal obligation whatsoever, no contractual obligation whatsoever, to read the materials that the company sends them, because they're independent contractors.

Then he said, you know, after 35 years as a State Farm agent, that he knew full well what it meant to be ethical, he didn't need the company to teach him anything.

Frankly, Mr. Knapp's testimony and his refusal to acknowledge even so much as an obligation to read what the company sends him about his ethical and legal obligations as a State Farm agent, illustrate precisely why the company is justified in requiring the agents to attend the annual meeting. It has no other way of knowing whether they even read the materials that it sends them.

Now, the reasonableness of the requirement, having been demonstrated, one meeting, once a year, half a day, on ethics and legal obligations, I will turn as promised the legal basis for State Farm to require attendance at this meeting. And the first legal basis is the language of the agreement.

In -- the importance of ethics and legal compliance emphasized throughout the agreement. Section 1-A, in particular, says the agents must, quote, avoid conflicts of interests, cooperate with and advance the interests of the company, the agents, and the policyholders.

Well, cooperating with and advancing the interests of the company, the agents and the policyholders, particularly in terms of avoiding conflicts of interests, is a large part what these meetings are about.

Section 1-B, upon which Mr. Garner relies, says that the agent has control over his daily activities. That's true; he's an independent contractor. He has control over his dally activities. But what does that really mean? Certainly, the company can't tell the agent, you should open your doors at 9 and close them at 5, or open them at 8 and close at 6. You can't take Wednesdays off; you have to see so many policyholders day.

The company can't tell them to do that. That is control over his dally activities, but requiring attendance at one meeting, half a day, once a year, does not impinge on his daily activities. And I would cite the Court to the case, not previously cited by ourselves, Samson versus Harvey's Lake Borough -- that's S-A-M-S-O-N, Harvey's Lake Borough at 881 F. Sup 138.

THE COURT: 881 F sup --

MR. REICHLER: F sup 138, Middle District of

Pennsylvania, 1995, where the Court said that required attendance at council meetings does not indicate supervision or control of one's daily work activity. And that is at page 143 of that opinion, Your Honor. So it be -- the quote cite is 81 F sup at 143.

And that's --

THE COURT: One-forty?

MR. REICHLER: Three. And that's the page of the opinion. I think I gave the formal cite, and the page cite is 143 of F sup.

And, Your Honor, we submit that that is the proper way to interpret this agreement. Agents are independent contractors. The company does not tell them when to open their doors, what to do during the day, and when to close up at night and what days to take off and when to take a vacation. But requiring attendance at one meeting on ethics, once a year, is not an impingement on their daily work activities and, therefore, it's not a violation of Section 1-B.

And, finally, there is -- the law, in addition to what is in the contract, as Your Honor knows from our briefs, and I will not be repetitive here. I will merely state the point because we've addressed this both in our summary judgment briefs and in the July 19th submission that we made to the Court at the Court's request on this subject.

Under the law of agency, both restatement and the

case law, a principal has the right and the authority to give reasonable instructions to an agent even to perform duties and obligations or tasks beyond the scope of the written agreement and the agent is under a duty to comply, if those are, in fact, reasonable instructions.

And we submit that both under the contract, under the agent's agreement, languages I have cited, and under the common law of agency, it is authorized, it is legal, it is appropriate, and it is eminently reasonable for State Farm, in order assure itself and its agents that they are aware of what is fundamental to the business of both State Farm and the agents, their ethical and legal obligations, and there is a public interest that is served by this requirement as well, Your Honor.

And we urge the Court not to grant the relief that Plaintiffs are requesting, and to oppose State Farm's right to insist on this really minimal intrusion on the agents' time for a very important purpose.

Thank you.

THE COURT: Mr. Garner, rebuttal?

MR. GARNER: No rebuttal, Your Honor.

THE COURT: I neglected to ask counsel -- I haven't looked it up, but when we were into the Partner Agent Program, I was wondering whether any of you know when Congress passed the legislation allowing insurance companies to write -- to sell securities and gave the securities industry or business the right to sell

insurance.

MR. REICHLER: Your Honor, I would be happy to furnish the Court by this afternoon with the exact date.

THE COURT: I just wanted to know whether you knew it offhand.

MR. REICHLER: I don't want to speculate. So the answer is no.

Your Honor, I have one additional item not related to this argument. I'm not looking to extend my time, but there is a matter I'd like to raise with Court with the Court's permission.

THE COURT: On what subject, sir?

MR. REICHLER: Well, Your Honor, at the beginning of the trial we proffered the Court what was -- what we styled as a binder of P submissions, which is the -- it collects the stipulations, the evidentiary admissions from the statement of undisputed fact and our assertion of what our key deposition exhibits and key documents.

Your Honor said at the time, hold off on it, there may be other things -- I hope I'm not misconstruing. But I understood Your Honor to say, without accepting -- Your Honor said, hold off on it now, offer it later, there may be other things you want to add after the trial. So we do have this binder.

THE COURT: I wanted to give Mr. Garner an opportunity.

Do you wish to supply such a binder?

MR. GARNER: Your Honor, the evidence that we have cited in our closing argument and on the sheets that we handed up and we referred to there, are basically what we would put into such a binder. If the Court wants us to collect it --

THE COURT: No, I don't.

And I think that you can accomplish that, Mr. Reichler, in your briefing by telling us what you desire to emphasize. I don't wish to accumulate too much paper and have it all hauled down to Florida. Everything that you have there is in your original submission to me and in your supporting memoranda. You can emphasize what you wish, and be assured I will read it and give it all the consideration that I think it merits.

MR. REICHLER: Your Honor, I have no doubt about that, I and appreciate your saying that. The reason that we are proffering this -- and if Your Honor feels it's too much paper, obviously we respect Your Honor's determination on this -- but I have a feeling that when we hear about -- when we get to the subject of post-trial findings of fact, proposed findings of fact and rules of law, I have a feeling that we're going to have some strict page limits imposed. And rather than --

THE COURT: You are, but not on the underlying documents. You're proffering underlying documents, and all that you have to do is to cite them and say these are -- or you can have an asterisk or two asterisks what you believe

to be the key documents. And you can do that in the frontispiece to the memorandum and, therefore, the pages won't count, Mr. Reichler.

MR. REICHLER: That solves the problem. May I just ask a question to clarify? And I withdraw the proffer; so I'm not seeking to push this issue.

Would it be convenient to the Court if, for those documents that we asterisk in the way Your Honor has suggested and if we keep the number limited, just have them as attachments or appendices to the purposed finding, would that be easier for the Court, or should we just --

THE COURT: Just cite it.

MR. REICHLER: Okay. That's what we'll do, Your Honor. Thank you.

THE COURT: Let me reverse myself, and if you are able to, within the next 24 hours, cite the legislation that permitted the insurance companies to sell securities.

MR. REICHLER: May we -- how would you like us to supply it? Should we call your clerk or --

THE COURT: Yes, or you can fax it, any way, informally.

MR. REICHLER: Okay. Thank you, your Honor.

THE COURT: On the briefing schedule, I want proposed findings and proposed conclusions, and I want to give each of you an opportunity to comment on the proposed findings and conclusions submitted by the other side, and I'll permit a memorandum in support of the proposed

findings and in support of your comments on the -- your adversary's proposals.

So, Mr. Garner, you are leading off, and I don't know what your vacation schedule is, when will you be able to submit the proposed findings and conclusions with your memoranda?

MR. GARNER: Your Honor, I spoke with Mr. Reichler about this earlier. My schedule is that I am -- have a important family matter --

THE COURT: Pardon?

MR. GARNER: I have an important family matter the rest of this week and then I have vacation from the 11th to the 17th. I would like to be able to submit this on the 30th of August if that's acceptable to the Court.

THE COURT: Objection?

MR. REICHLER: No objection, Your Honor.

THE COURT: That was August the --

MR. GARNER: The 30th. I don't have a calendar in front of me.

MR. REICHLER: I think it's a Tuesday.

MR. GARNER: A Tuesday would be good.

THE COURT: All right. Then I will -- the Defendant's proposed findings will be due at the same time.

MR. REICHLER: Yes, sir, that's our understanding.

THE COURT: I will permit 30 -- a memorandum of 30 pages in length.

Now the comments on the adversary's proposed

findings, have you greed upon such a date?

MR. REICHLER: We haven't discussed it, Your Honor, because we hadn't presumed that Your Honor was going to permit that. We think it's a very good idea, but we haven't discussed it yet.

Would you like us to take a minute to confer and make a proposal?

THE COURT: Yes.

MR. GARNER: May I get a clarification before we do that? Your Honor had said comments and a supporting memorandum, and I'm not sure, if that's a case, what Your Honor means by comments.

THE COURT: I mean addressing Mr. Reichler's proposing findings and filing a reply, a response.

MR. GARNER: I understand. In terms of a format, would that be a document separate from a memorandum that would support those comments? I sort --

THE COURT: I leave that up to you. I would proffer it to be a separate document, the memorandum.

MR. GARNER: Very well.

MR. REICHLER: Your Honor, we would propose to the Court that the comments and supporting memorandum be submitted, again, simultaneously, 21 days after the proposed findings and conclusion. So if it's August 30th that the proposed findings would be due, 21 days would be September 20th, and that would also be a Tuesday.

THE COURT: Twenty-five pages ought to be

sufficient.

MR. REICHLER: This is fro the memo or the
comment --

THE COURT: The memorandum. I think I ought to
limit the pages on the comments also. Twenty pages ought
to be sufficient for that.

Is there anything further, Counsel?

MR. REICHLER: No, except to thank you Your Honor.

MR. GARNER: Thank you, Your Honor.

I guess one question, I didn't hear a page limit
on the findings and conclusions themselves.

THE COURT: I'm not going to give you a -- I want
them to be merely findings and conclusions and no discourse
beyond that.

MR. GARNER: Very well, your Honor. Thank you.

THE COURT: May I go off the record for to moment.

(Off-the-record Discussion not related to the
case.)

THE COURT: We stand adjourned.

(The proceedings adjourned at 11:25 a.m.)

CERTIFICATE OF REPORTER

I, MARGARY F. ROGERS, an Official Court
Reporter for the Superior Court of the District of
Columbia, do hereby certify that I reported by machine
shorthand, in my official capacity, the proceedings had

and testimony adduced, upon the Bench Trial in the case of

NATIONAL ASSOCIATION OF STATE FARM AGENTS, INC.,
v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Civil Action No. 02ca004089 in said Court on the 1st
day of August, 2005.

I further certify that the foregoing 80 pages
constitute the official transcript of said proceedings,
as taken from said shorthand notes, my computer realtime
display, together with the audio sync and tape recording
of said proceedings.

In witness whereof, I have hereto subscribed
my name, this 2nd day of August, 2005.

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