No. 19-14096

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OSCAR INSURANCE COMPANY OF FLORIDA,
Plaintiff-Appellant,

v.

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, No. 6:18-cv-01944 (Byron, J.)

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Oscar Insurance Co. of Fla. v. Blue Cross and Blue Shield of Fla., Inc., et al.
No. 19-14096

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned hereby certifies that the persons and entities listed below have an interest in the outcome of this case and were omitted from the certificate of interested persons in Appellant's opening brief. *See* 11th Cir. R. 26.1-2(b).

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INTRODUCTION

The McCarran-Ferguson inquiry asks whether the "particular practice" being challenged is the "business of insurance," *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 781-782 (1993) (quotation marks and emphasis omitted)—and, if so, whether it remains subject to the antitrust laws under the exception for boycott, coercion, or intimidation. The "particular practice" challenged here is not the mere selling of insurance through brokers. Oscar's complaint alleges that Florida Blue—alone among all ACA insurers in the State, if not the country—selectively enforces its exclusive-dealing arrangements with brokers to exclude one targeted rival from the market. Florida Blue has aggressively threatened and terminated brokers that signed up to sell Oscar plans, but not brokers selling other insurers' plans; it has terminated brokers who signed up with Oscar from all Florida Blue product lines across the entire State, not just the market Oscar had entered; and it has threatened to withhold those brokers' commissions, even on completed sales. Opening Br. 11-14.

Congress did not intend to immunize such conduct from the antitrust laws. As Oscar has shown (at 4-7), and Florida Blue nowhere disputes, Congress enacted McCarran-Ferguson to allow a limited immunity for cooperative ratemaking and underwriting—practices to which the conduct challenged here bears no resemblance. Congress decisively "reject[ed]" a broader immunity for the

insurance industry. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210-211, 220 (1979). Instead, the governing test under *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982), confirms that Florida Blue's conduct is not the "business of insurance" because it (1) does not transfer policyholder risk; (2) is not integral to the policy relationship; and (3) is not limited to entities within the insurance industry.

Florida Blue's response relies principally on dicta in *Thompson v. New York Life Insurance Co.*, 644 F.2d 439 (5th Cir. Unit B 1981). But the result in *Thompson* is not controlling here, and its reasoning was abrogated by *Pireno*. Florida Blue's remaining arguments reflect two critical errors: First, Florida Blue focuses on whether the simple selling of insurance through brokers is the "business of insurance." Under *Hartford Fire*, that is not the relevant question because that is not the practice challenged here. Second, Florida Blue and its amici mount an expansive argument that any practice that increases an insurer's policy sales is the "business of insurance." That is nearly the opposite of what *Royal Drug* and *Pireno* held. A practice may be a sound business strategy for insurers, but it is not the "business of insurance" unless it involves the transfer of risk from the policyholder to the insurer and meets the other *Pireno* factors. Under Florida Blue's theory, nearly all insurer practices—no matter how anticompetitive—would be immune from antitrust scrutiny, and the critical distinction between the

"business of insurance" and the "business of insurers" would evaporate. *Royal Drug*, 440 U.S. at 211, 232-233.

Regardless, Florida Blue's selective exclusivity practices plainly constitute "coercion." 15 U.S.C. § 1013(b). Florida Blue says a practice cannot be coercive unless it involves leveraging one transaction to collaterally influence another, but that is exactly what Oscar alleges. Florida Blue further claims a practice cannot be coercive unless it involves concerted action. That requirement appears nowhere in the statutory text or case law, and it is foreign to the ordinary meaning of "coercion." But, in any event, the complaint satisfies any such requirement by alleging that Florida Blue colluded with nonemployee general agents to enforce its exclusivity practices.

On either of those two independent bases, the Court should hold that McCarran-Ferguson does not apply and reinstate Oscar's complaint.

ARGUMENT

I. FLORIDA BLUE'S EXCLUSIVE-DEALING PRACTICES ARE NOT "THE BUSINESS OF INSURANCE"

McCarran-Ferguson immunity is "narrow[]." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). It applies only to the "'business of insurance,'" not the "'business of insurers.'" *Id.* at 211. In *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982), the Supreme Court set out the

controlling three-factor test for identifying the "business of insurance." As Oscar's brief shows (at 22-47), the practices challenged here satisfy none of those factors.

A. *Pireno*, Not *Thompson*, Controls

Florida Blue's principal response (at 22-29) asks this Court to disregard *Pireno*'s test in favor of a single sentence in a pre-*Pireno* case—*Thompson v. New York Life Insurance Co.*, 644 F.2d 439 (5th Cir. Unit B 1981)—that surveyed decisions from other courts on an issue not presented there. Florida Blue cites *Thompson*'s observation, "upon turning to decisions of sister courts, that exclusive agency clauses have been deemed exempt from anti-trust scrutiny as part of the business of insurance." *Id.* at 443. But as its wording makes clear, that sentence did not purport to state Fifth Circuit law. It merely observed that two out-of-circuit district courts, in disagreement with a third, had deemed "exclusive agency clauses" to be the business of insurance under McCarran-Ferguson. *Id.* (citing *Black v. Nationwide Mut. Ins. Co.*, 429 F. Supp. 458, 463 (W.D. Pa. 1977), *aff'd*, 571 F.2d 571 (3d Cir. 1978); *Steinberg v. Guardian Life Ins. Co. of Am.*, 486 F. Supp. 122, 124 (E.D. Pa. 1980); *Ray v. United Family Life Ins. Co.*, 430 F. Supp. 1353 (W.D.N.C. 1977)). The Court then immediately repudiated the reasoning of those decisions. Whereas the two Pennsylvania district courts had held that *all* insurer-agent relations are "the business of insurance," *Black*, 429 F. Supp. at 463; *see Steinberg*, 486 F. Supp. at 124, the *Thompson* Court concluded that "no[t] all

dealings between insurance companies and their agents are exempted by the McCarran-Ferguson Act," 644 F.2d at 444.

Moreover, the Fifth Circuit could not have adopted the two district courts' holdings as circuit precedent because *Thompson* had no occasion to consider exclusive-agency arrangements, let alone the specific practices challenged here. Although one clause of the agent's contract in *Thompson* conditioned his bonus on his not selling other insurers' plans ("the exclusive-agency clause"), that clause was not at issue: The insurer never accused the agent of breaching it, and the agent never challenged it as unlawful. 644 F.2d at 441. The only contract provision in dispute was a separate provision ("the noncompete clause") under which the agent forfeited his bonus for engaging in noninsurance employment (in his case, building a motel/restaurant). *Id.* Florida Blue is thus incorrect (at 23-24) that "the agent in *Thompson* … challenge[d] an 'exclusive agency clause[],'" much less that the Fifth Circuit "considered" and held that clause immune under McCarran-Ferguson. The Fifth Circuit did not opine on that clause. And doing so would have been dicta: That clause "was never at issue in the case." *In re BFW Liquidation, LLC*, 899 F.3d 1178, 1187 (11th Cir. 2018); *see United States v. Johnson*, 921 F.3d 991, 1003 (11th Cir. 2019) (en banc) (decision's "'binding authority'" is "'limited to the

facts of the case then before the court and the questions presented to the court in the light of those facts'").[1]

Accordingly, *Thompson*'s result is not binding, and the sentence Florida Blue emphasizes carries no weight. Moreover, no other part of *Thompson*'s reasoning suggests a more general controlling principle. *Thompson* concluded that the noncompete clause was "the business of insurance" because it "did not force [the agent] to engage in activities unrelated to insurance." 644 F.2d at 444. But not even Florida Blue argues that McCarran-Ferguson immunity turns on whether the challenged practice is "unrelated to insurance." That rule would be irreconcilable with *Pireno*—which rejected immunity for a claims-adjustment practice that plainly "related to" insurance—and would create blanket immunity for the business of *insurers*. *See* 458 U.S. at 122-123, 132.

Indeed, whatever relevant legal force *Thompson* ever had has been abrogated because its analysis "cannot be reconciled with" *Pireno*'s three-factor test. *Cottrell*

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[1] Florida Blue cites (at 25) *Thompson*'s single reference to "the challenged provisions," plural. 644 F.2d at 442. *But see id. at* 444 (describing "the challenged condition," singular). That errant "s" cannot change the historical fact that the plaintiff challenged only the noncompete clause. He did not challenge (or even mention) the exclusive-agency clause. *See id.* at 441 ("[A]ppellant alleged that the Nylic restriction regarding outside employment constituted a per se violation of section 1 of the Sherman Act[.]"); *see also* Add. 7-8 (Complaint, *Thompson v. New York Life Ins. Co.*, No. C78-1149A (N.D. Ga. July 10, 1978)); *United States v. Glover*, 179 F.3d 1300, 1303 n.5 (11th Cir. 1999) (taking judicial notice of court documents to elucidate prior opinion).

v. Caldwell, 85 F.3d 1480, 1485 (11th Cir. 1996); *see Girard v. M/V 'Blacksheep,'* 840 F.3d 1351, 1354-1355 & n.2 (11th Cir. 2016) (circuit precedent implicitly abrogated where it applied a test different from Supreme Court's).

Thompson's analysis undisputedly bears no resemblance to that prescribed by *Pireno*. As Florida Blue concedes (at 26), *Thompson* failed entirely to address *Pireno*'s first factor (transfer of policyholder risk)—the "indispensable" and potentially "decisive" factor. *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 356 (3d Cir. 2010). The court focused instead on factors that have no relevance under *Pireno*. Although the court described "the proper focus" as "the impact of the challenged activity or restriction on the insurer/insured relationship," *Thompson*, 644 F.2d at 443—language resembling *Pireno*'s second factor—the court never explained what that impact was in the case before it, and that consideration did not influence the result. Instead, the court considered only the noncompete clause's impact on the agent. *Id.* at 444. When the agent argued that the challenged practice involved "parties outside the insurance industry," *id.* at 443—evoking *Pireno*'s third factor—the court gave that argument no weight, *id.*

Florida Blue protests (at 25) that *Pireno* could not have limited *Thompson* without mentioning it by name. But this Court has repeatedly recognized that circuit precedent may be abrogated implicitly, particularly where a later Supreme Court decision "provided additional instruction about the proper standard."

Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., Inc., 146 F.3d 1309, 1310-1311 (11th Cir. 1998); *see United States v. Burgess*, 175 F.3d 1261, 1266 (11th Cir. 1999). Florida Blue also asserts (at 26) that *Pireno* worked no change in the law because it merely restated *Royal Drug*. But although *Royal Drug* discussed issues that would become the *Pireno* factors, it did not identify them as a controlling test. It was *Pireno* that "explicitly framed the question as whether a particular *practice* is part of the business of insurance" and established the test governing that inquiry. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 781-782 (1993) (quotation marks omitted).

Finally, Florida Blue contends (at 26) that *Thompson* has been "cited with approval numerous times since *Pireno*." In fact, only four appellate decisions have ever cited *Thompson—Sanger Insurance Agency v. HUB International, Ltd.*, 802 F.3d 732 (5th Cir. 2015), discussed below, and three others: one that predated *Pireno*, *see Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 321 n.27 (D.C. Cir. Mar. 16, 1982), one that viewed *Thompson* as "leaving … open" whether the "business of insurance" includes "matters germane to insurer-agent relationships," *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 25 n.5 (1st Cir. 1988), and one that cited *Thompson* for the Rule 15 amendment standard, *Youmans v. Simon*, 791 F.2d 341, 348 (5th Cir. 1986). Florida Blue resorts (at 26-27) to two unpublished district court decisions, but neither carries any binding or persuasive

weight—particularly in the face of district court cases criticizing *Thompson*. *E.g.*, *Maryland v. Blue Cross & Blue Shield Ass'n*, 620 F. Supp. 907, 917 (D. Md. 1985); *James M. King & Assocs. v. G.D. Van Wagenen Co.*, 1987 WL 346057, at *8 (D. Minn. Jan. 6, 1987).[2]

Florida Blue's efforts to depict the question before this Court as a settled one therefore fail. No "great weight of authority" addresses McCarran-Ferguson's application to insurer-agent exclusivity arrangements in general, *cf.* Response Br. 28, and none applies *Pireno* to the particular practice alleged here—which is unsurprising since Florida Blue is "the only ACA insurer in the State of Florida, if not the country, that requires exclusivity." Doc. 75 at 46; *see id.* at 29.

B. The *Pireno* Factors Are Not Met

1. The challenged practices do not involve risk transfer

Florida Blue's exclusivity practices are not the business of insurance under *Pireno*. First, the challenged practices do not "ha[ve] the effect of transferring or spreading a policyholder's risk" in the manner "characteristic of insurance." 458 U.S. at 129-130. As Oscar's brief explains (at 24-29), those exclusivity

[2] Florida Blue cites three other appellate cases, but all either preceded *Pireno*, *see Owens v. Aetna Life & Cas. Co.*, 654 F.2d 218 (3d Cir. 1981); *Card v. National Life Ins. Co.*, 603 F.2d 828 (10th Cir. 1979), or addressed only the general practice of selling insurance through brokers, which is not the practice challenged here, *see Owens*, 654 F.2d at 225-226 & n.6; *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 68 (1st Cir. 2005).

arrangements are a business practice both logically and temporally unconnected to the transfer of risk "from insured to insurer" that is "effected by means of … the insurance policy." *Pireno*, 458 U.S. at 130. As in *Royal Drug* and *Pireno*, the exclusivity practices enable Florida Blue to increase its profits, but they do not define the scope of the risk transferred under the policy or the promises Florida Blue undertakes.

Florida Blue does not contend that the challenged practices themselves "involve any underwriting or spreading of risk," *Royal Drug*, 440 U.S. at 214, even though that is the "indispensable characteristic of insurance," *id.* at 212; *see Insurance Brokerage Antitrust Litig.*, 618 F.3d at 356 (first *Pireno* factor "decisive"). Florida Blue even concedes (at 34) that McCarran-Ferguson focuses on the "'contract of insurance'" between insurer and policyholder—not agreements between the insurer and third parties. Florida Blue instead argues (1) that brokers help sell insurance policies, thereby spreading risk, by helping customers select the right policies for their needs, and (2) that exclusivity prevents competitors from "siphoning off" policyholders from Florida Blue's risk pool. Both arguments fail.

The first argument fails because Oscar's complaint does not challenge Florida Blue's decision to sell insurance through agents. Florida Blue notes (at 30, 36) that agents "interact with consumers" at the point of sale and "help insureds select the right plan," but that argument repeats the district court's error in focusing

on the role of brokers in the sale of insurance rather than on the particular "qualit[ies] of the practice" that is challenged in the complaint. *Hartford Life*, 509 U.S. at 781-782; *see* Opening Br. 29-31.

As to the second argument, whether a challenged practice prevents the "siphoning off" of an insurer's policyholders is not the relevant test. The mere fact that a practice increases the number of Florida Blue policyholders does not mean the practice transfers risk from policyholder to insurer, as *Pireno*'s first factor requires. Opening Br. 34-35. Florida Blue relies on the nonbinding decisions in *Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d 928 (9th Cir. 1983), and *Sanger*, 802 F.3d 732, but neither supports its analysis.

Feinstein did not hold insurer-agent exclusivity to be the business of insurance. The Ninth Circuit considered a challenge to an agreement between a medical association and insurers to offer group medical malpractice insurance only to members of the association. 714 F.2d at 932. The court held that the members-only limitation involved transferring risk because it defined which persons the group policy would insure, thereby defining the risk the policy would transfer to the insurer, *id.*—indeed, the limitation was part and parcel with the policy. The challenged arrangement in no way restricted the persons with whom any insurer or agent could deal—it simply restricted who would be covered by the group policy.

Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Applications* ¶ 220b (4th ed. 2019).[3]

Oscar's opening brief explains (at 36-37) why *Sanger* is distinguishable. Like *Feinstein*, that case involved a professional association that engaged a broker, HUB, to negotiate and service a group insurance policy for the association. *Sanger*, 802 F.3d at 734-735. Sanger, an agency that wished to sell policies to members of other associations, argued HUB had leveraged its market power as the association's exclusive broker to induce insurers to refrain from writing policies through other brokers for other associations' members. *Id.* at 735-736, 742-743. Citing *Feinstein*, the Fifth Circuit held that this practice involved the transfer of risk because it had the effect of defining who would be insured under the group policy—*i.e.*, "defin[ing] [the] pool of insureds over which risk is spread"—which in turn defined the risk transferred to the insurers by means of the policy. *Id.* at 743 (quoting *Feinstein*, 714 F.2d at 932). Allowing insurance to be offered by another agent through another association—"siphon[ing] off" members of the association—would have altered the risk transferred under that policy. *Id.* at 744.

[3] Although the association in *Feinstein* engaged an exclusive agent to service the group policy, that agreement did not preclude the agent from selling policies of other insurers and was not the focus of the plaintiffs' challenge. 714 F.2d at 930, 931-932. Rather, the "plaintiffs … focused their ire upon the agreement between the medical association and the insurers to offer the malpractice insurance only to members of [the association]." *Id.* at 932. Those facts are not analogous here.

Accordingly, the dispositive fact in *Sanger* was that the insurance was offered on a group basis, such that a change to the pool of insureds changed the risk profile of the insured entity (the group) and thus changed the risk being transferred from the policyholder to the insurer under the insurance contract. 802 F.3d at 743. Here, by contrast, the risk transferred under an individual ACA policy is defined by the characteristics of the insured individual—it does not depend on the number or characteristics of other individuals insured under separate insurance contracts. Indeed, the ACA prohibits Florida Blue from taking individual risk profiles into account—a fact Florida Blue fails to address. *See* Opening Br. 37.

Florida Blue's response (at 32) conflates what Florida Blue calls the "risk pool"—*i.e.*, the pool of all policyholders insured under individual ACA health plans issued by Florida Blue—with what *Sanger* calls the "risk profile" of one particular insured entity. As Oscar's brief explains (at 37-39), the insured entity's risk profile determines the scope of risk transferred by the policy, which is the relevant consideration under *Pireno*, 458 U.S. at 131 ("[T]he insurance policy defines the scope of risk assumed by the insurer from the insured."). Changes to the risk pool of individual policies, on the other hand, do not.

To be sure, the composition of an insurer's risk pool affects the insurer's ability to manage its own risk. *See* Response Br. 32 (describing adverse selection problems); Harrington Br. 7. But an insurer's effort to manage its own risk by

attracting more customers and increasing profits is not "the business of insurance"; it is the business of insurers. *Royal Drug*, 440 U.S. at 213-214. *Royal Drug* underscored this "important distinction between risk underwriting and risk reduction." *Id.* at 214 n.12. Even practices that "reduce[] [an insurer's] liability and therefore its risk" are not the business of insurance without involving the underwriting of risk, *id.*—*i.e.*, the "transfer of risk from insured to insurer [that] is effected by means of the contract between the parties," *Pireno*, 458 U.S. at 130. Moreover, even if an insurer's own financial risk were the relevant metric, the result would be the same because the ACA's risk-adjustment provisions are designed to reduce insurers' sensitivity to changes in their pool of individual ACA policyholders. Opening Br. 39-40.[4]

[4] Citing material outside the complaint, Florida Blue disputes (at 33 & n.6) Oscar's reliance on the ACA risk-adjustment provisions and faults Oscar for not having conclusively established the point in the complaint. But McCarran-Ferguson immunity is an affirmative defense, as to which Florida Blue bears the burden. *See* Opening Br. 19 & n.3; *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Seasongood v. K&K Ins. Agency*, 548 F.2d 729, 732 (8th Cir. 1977). While the panel in *Gilchrist v. State Farm Mutual Automobile Insurance Co.*, 390 F.3d 1327, 1335 (11th Cir. 2004), asserted without support that the immunity is jurisdictional—a questionable proposition that cannot be determined by a "drive-by jurisdictional ruling[]," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)—that assertion cannot override the Supreme Court's treatment of the issue as an affirmative defense. *See Santiago-Lugo v. Warden*, 785 F.3d 467, 471-474 & n.4 (11th Cir. 2015).

That Florida Blue's selective exclusivity practices might increase the number of policyholders Florida Blue insures thus does not satisfy *Pireno*'s first factor. Florida Blue's contrary analysis assumes that any practice that "*affects* the transferring and spreading of policyholder risk" is the business of insurance. Response Br. 30 (emphasis added); *see id.* at 36. Under that test, however, nearly all anticompetitive conduct by insurers would satisfy *Pireno*'s first factor, because nearly all anticompetitive conduct insulates the insurer from rivals drawing away its policyholders. *See* Areeda & Hovenkamp, *supra*, ¶ 500. That result would effectively delete *Pireno*'s first and most important element and collapse Congress's careful distinction between the business of insurance and the business of insurers. *Royal Drug*, 440 U.S. at 211; *see* Opening Br. 34-35; U.S. Br. 14-17; Hovenkamp et al. Br. 15-19. And it would stretch McCarran-Ferguson's "narrow[]" antitrust immunity beyond the scope Congress intended to confer. *Royal Drug*, 440 U.S. at 231.

2. Florida Blue's practices are not integral to the policy relationship

As Oscar's brief shows (at 41-44), Florida Blue's selective exclusivity practices are not integral to "the policy relationship between the insurer and the insured." *Pireno*, 458 U.S. at 129. Those practices are a matter between Florida Blue and its agents alone, and they do not influence "'the type of policy which c[an] be issued, its reliability, interpretation, [or] enforcement.'" *Royal Drug*, 440

U.S. at 215-216. Florida consumers can obtain the exact same coverage from Florida Blue with or without a broker (and regardless of whether that broker is exclusive to Florida Blue). Opening Br. 42-43.

Florida Blue responds (at 38) by simply cross-referencing its argument on the first *Pireno* factor. But the two factors call for different analyses. Florida Blue repeats its reliance on *Thompson* and *Sanger*, but as explained, those cases do not control—indeed, both decisions barely addressed this issue. *See Sanger*, 802 F.3d at 745 (addressing issue in two sentences by analogy to market-allocation agreement); *Thompson*, 644 F.2d at 444 (focusing instead on challenged practice's impact on agent). Florida Blue also cites *Royal Drug* for the proposition that the "business of insurance" under McCarran-Ferguson "may have been intended to include" contracts between insurers and agents. Response Br. 39 (quoting *Royal Drug*, 440 U.S. at 216, 224 n.32). But as *Royal Drug* makes clear, the statutory focus was on "the relationship between the insurance company and the policyholder," not on "separate contractual arrangements" between the insurer and third parties—even those that are necessary to the insurer's ability to provide insurance and that directly affect the rate terms on which the insurer provides coverage. 440 U.S. at 216-217 (quotation marks omitted). The Court commented on transactions between insurers and agents only to note that McCarran-Ferguson's legislative history is mixed, with some evidence indicating that Congress "chose

not to include" insurer-agent agreements within the exemption for the business of insurance. *Id.* at 224 n.32.

Finally, as Oscar's brief emphasizes (at 42-43), Florida Blue is "the only ACA insurer in the State of Florida, if not the country, that requires exclusivity." Doc. 75 at 46. And Florida Blue selectively enforces that requirement—it does not demand exclusivity from brokers appointed to sell plans of insurers other than Oscar. *Id.* at 26-28. As a matter of simple logic, this pattern confirms that Florida Blue's exclusivity practices are not integral to its relationship with policyholders and do not affect the types of policies it issues. Florida Blue offers no response except to invoke (at 39) a "long list of cases treating routine insurer-agent dealings as part of the 'business of insurance.'" But the practices challenged here do not involve the "routine" use of an agent to sell insurance. And as discussed, the alleged "long list of cases" is illusory. *Supra* pp. 8-9.

3. Florida Blue's exclusivity practices are not limited to the insurance industry

Florida Blue does not dispute that entities outside the insurance industry engage in exclusivity practices. That silence is dispositive of *Pireno*'s third factor because the McCarran-Ferguson exemption was intended to protect "intra-industry" cooperation in ratemaking and underwriting—*i.e.*, the practices that define the "business of insurance" and distinguish it from other business practices

Congress did not intend to immunize. *Royal Drug*, 440 U.S. at 221; *see id.* at 211, 224; Opening Br. 45-47.

Florida Blue's position contradicts this Court's decision in *FTC v. IAB Marketing Associates, LP*, 746 F.3d 1228 (11th Cir. 2014), in which the Court found that the challenged practice failed *Pireno*'s third factor, and was not the business of insurance, because it was "not limited to entities within the insurance industry." *Id.* at 1236. Florida Blue downplays (at 41) that decision, but the fact that "[n]on-insurance company associations" frequently engaged in the challenged practice was "[c]hief among" the Court's reasons for rejecting the defendant's McCarran-Ferguson defense. *Id.* Florida Blue's position also contravenes *Hartford Fire*, which explained that McCarran-Ferguson immunity "single[s] out one activity from others," not "one entity from another." 509 U.S. at 781; *see* Opening Br. 47.

Florida Blue again falls back (at 40-41) on *Thompson* and *Sanger*. But *Thompson* declined to address what would become the third *Pireno* factor, *see* 644 F.2d at 443, and in *Sanger*, the issue was "undisputed[]" and therefore not subject to adversary treatment, 802 F.3d at 744-745.

Because none of the three *Pireno* factors is met, the Court should hold that Florida Blue's exclusivity practices are not "the business of insurance."

II. FLORIDA BLUE'S EXCLUSIVE-DEALING PRACTICES ARE COERCIVE

Alternatively, the Court could pretermit the "business of insurance" issue and decide this case on the independent ground that Florida Blue's alleged conduct constitutes "coercion." Opening Br. 48-54. As Oscar has shown, "coercion" within the meaning of the McCarran-Ferguson Act is to be interpreted in its "usual sense," *Hartford Fire*, 509 U.S. at 802, and was intended to be "broad and unqualified," *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 550 (1978); *see* Opening Br. 48-49; U.S. Br. 25-26.

The district court erroneously held that Florida Blue's exclusive-dealing practices are not coercive because they are not per se unlawful and enforcing a lawful contract can never be coercive. Opening Br. 51-54. Florida Blue rightly does not defend that reasoning. *See* Response Br. 42-56. Instead, Florida Blue relies on two requirements the Supreme Court has held applicable to the "boycott" exception. Both arguments fail. First, whether or not "coercion," like a boycott, requires leveraging of unrelated transactions, that element is clearly present here. And second, concerted action is not a required element of coercion; but even if it were, Oscar's complaint alleges it. The Court should therefore hold that the coercion exception applies.

A. Florida Blue Leverages Its Transactions With Brokers To Impede Brokers' Unrelated Transactions With Oscar

Citing *Hartford Fire*, Florida Blue contends (at 42) that "coercion" requires leveraging "unrelated" transactions. *Hartford Fire* considered McCarran-Ferguson's "boycott" exception, explaining that leveraging of unrelated transactions distinguishes a boycott from an ordinary refusal to deal because refusing to deal in one set of transactions as a means of influencing the terms of a separate, unrelated transaction is what gives the refusal its "great coercive force." 509 U.S. at 802-803. Florida Blue assumes (at 43) that the same requirement applies also to "coercion."[5] Even crediting that assumption, the conduct alleged here plainly involves Florida Blue's refusal and threatened refusal to deal in one set of transactions as a means of impeding separate, unrelated transactions.

As Oscar's brief explains (at 11-13, 50-51), Florida Blue gave brokers an "all-or-nothing" choice either to accede to its demands not to do business with Oscar in the individual ACA market in Orlando or to lose Florida Blue's business in every product line across the entire State—and to lose their commissions, even on completed transactions. Florida Blue asserts (at 44) that this occurred only "by

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[5] Florida Blue cites no authority except a footnote in *Hartford Fire* stating that a concerted agreement, without more, is not "coerc[ive]" in the "usual sense of that word." 509 U.S. at 808 n.6. The Court there did not hold that all requirements applicable to boycotts apply also to coercion, and such a holding would eliminate the distinction between those terms.

virtue of Florida law," which provides for statewide appointments, but Florida Blue does not explain why triggering a statewide consequence cannot be coercion; and state law does not explain Florida Blue's threats to terminate appointments in unrelated product lines. Florida Blue also suggests (at 44-45) that its contracted general agents (CGAs)—not Florida Blue itself—are responsible for withholding commissions. That ignores the allegations in the complaint, which must be accepted as true, that Florida Blue "use[s] its market power to coerce CGAs and in turn independent brokers," Doc. 75 at 26; that Florida Blue acted in concert with its CGAs, *id.* at 26, 50, 52; and that Florida Blue itself threatened brokers with the withholding of their commissions, *id.* at 23. That Florida Blue leveraged CGAs to "propagate" and "help" in its campaign to exclude Oscar, *id.* at 26, is fully consistent with the common-sense understanding of coercion.[6]

Florida Blue's remaining argument (at 44-47) is that even though it is a monopolist in the relevant market, its conduct toward brokers is not coercive because it involved no collateral leveraging of a product or transaction that is *unrelated*. But the entire gravamen of Oscar's complaint is that Florida Blue

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[6] Florida Blue contends (at 47-48) the Court should not look to the "common understanding" of the term coercion, calling that approach a "reject[ion]" of *Hartford Fire*. But *Hartford Fire* endorsed that definition, repeatedly referring to coercion "in the usual sense of that word." 509 U.S. at 808 n.6; *see id.* at 802; Opening Br. 48-49; U.S. Br. 25-29.

leveraged one set of transactions (its own broker appointments) as a means of impeding brokers' separate, unrelated appointments with Oscar. *Hartford Fire* twice identifies this fact pattern—X refuses to deal with Y unless Y refuses to deal with Z—as prototypically coercive. 509 U.S. at 803, 808; *see also United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 535 (1944) (insurers refused to deal with agents unless those agents stopped selling competing insurers' products); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 611-612 (1914) (retail merchants refused to deal with wholesalers unless wholesalers stopped selling to consumers).[7] Oscar's complaint thus alleges that "unrelated transactions are used as leverage to achieve the terms desired." *Hartford Fire*, 509 U.S. at 803; *cf. Feinstein*, 714 F.2d at 933 (insurance arrangement not coercive "[b]ecause it in no way limited the [plaintiffs'] ability to deal with third parties"). Whether or not leveraging is required for "coercion" under McCarran-Ferguson, Florida Blue's alleged exclusive-dealing practices entailed leveraging.

[7] Florida Blue attempts (at 45 n.9) to distinguish *South-Eastern Underwriters* on the ground that the case involved multiple coercive boycotts by insurers—one against insurers who refused to fix rates and one against agents who continued to sell those insurers' products. 322 U.S. at 535-536; *see Hartford Fire*, 509 U.S. at 808. But Florida Blue fails to explain how the presence of more than one coercive practice in that case makes it any less applicable.

B. Concerted Action Is Alleged But Not Required

Finally, Florida Blue contends (at 51-56) that the "coercion" exception does not apply because Oscar's complaint does not plead concerted action. That argument fails at the outset because Oscar did plead concerted action. The amended complaint alleges that Florida Blue works "in concert" with CGAs to enforce the exclusivity policy. Doc. 75 at 26; *id.* at 50, 52 (stating Section 1 claims for restraint of trade based on Florida Blue's concerted action with CGAs). Florida Blue calls (at 55) this allegation a naked legal conclusion, but the complaint alleges in detail how CGAs worked with Florida Blue to threaten and withhold commissions from brokers in furtherance of the exclusivity scheme. Doc. 75 at 23-24, 26. The complaint alleges that Florida Blue, acting in part "through the CGAs," initiated a "concerted effort" to exclude Oscar by threatening and intimidating brokers. *Id.* at 23. For example, the complaint cites a September 2018 email sent by a CGA threatening brokers with termination. *Id.* at 23-24. Those facts amply support the complaint's allegation of concerted action.[8]

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[8] While Florida Blue invokes (at 55-56) the Florida-law principle that agents cannot "conspire" with their principals, it cites no authority for its assumption that CGAs are "agents" in the common-law sense, and conspiracy under Florida law is not the relevant standard. Even assuming CGAs are agents, under federal antitrust law, courts recognize an "exception" to the general rule that a principal cannot conspire with its agent where the agent has an "independent personal stake in achieving the object of the conspiracy." *H&B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978). Here, the complaint alleges that

In any event, as the United States explains, "coercion" within the meaning of McCarran-Ferguson does not require concerted action. U.S. Br. 29-32; *see Weatherby v. RCA Corp.*, No. 85-CV-1613, 1986 WL 21336, at *4 (N.D.N.Y. May 9, 1986); *Ray*, 430 F. Supp. at 1358. Ordinary tools of statutory interpretation compel that result. McCarran-Ferguson immunity is "inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. § 1013(b); *see* Hovenkamp et al. Br. 23. The ordinary meaning of "coercion" reaches both group and individual behavior. Areeda & Hovenkamp, *supra*, ¶ 220a; *see Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 17 (1964) ("*a* supplier may not use coercion on its retail outlets to achieve resale price maintenance" (emphasis added)); *Coercion*, Black's Law Dictionary 345 (3d ed. 1933) ("where the relation of the parties is such that one is under subjection to the other"); U.S. Br. 29-30 (collecting examples).

Moreover, statutory text must be read to "'give effect to every word of [the] statute wherever possible.'" *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 70 (2011). Florida Blue's interpretation of "coercion" would render it duplicative of

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CGAs are not "part of" Florida Blue, *cf. Card*, 603 F.2d at 834, but independent contractors that serve their own economic interests by contracting not only to sell insurance policies, but also to provide services and support to other brokers, thereby wielding their own "considerable control" over brokers and the market generally. Doc. 75 at 17, 26.

the statute's "boycott" exception. 15 U.S.C. § 1013(b). According to Florida Blue, both exceptions require leveraging unrelated transactions. *Supra* Part II.A. If they both additionally require concerted action, little if any distinction between them would remain.

Separately, Florida Blue's interpretation disregards Congress's careful distinction between "agreement[s] to … coerce" and "act[s] of … coercion." 15 U.S.C. § 1013(b). Requiring an "act of … coercion" to entail concerted action would collapse these phrases. Areeda & Hovenkamp, *supra*, ¶ 220a. Florida Blue proposes (at 53) to solve that problem by rewriting the "coercion" exception to apply only to an "agreement" to coerce and "acts … in furtherance of that agreement." Apart from being completely atextual, Florida Blue's proposal does not eliminate the redundancy in its interpretation: Because an act cannot further an agreement unless there is also an agreement, Florida Blue's proposal still deprives the "act" of independent meaning.[9]

[9] Although the "boycott" exception likewise distinguishes between "agreement[s]" and "act[s]," collective action is inherent in the established meaning of that word. *See Hartford Fire*, 509 U.S. at 801. As explained above, the same is not true of coercion.

Florida Blue cites no caselaw supporting its strained reading of the statute.[10] Instead, it cites (at 51, 52, 54) authority suggesting that the exercise of monopoly power alone does not constitute coercion. *See Feinstein*, 714 F.2d at 933-934; 91 Cong. Rec. 462, 480-481 (1945) (statement of Sen. Ferguson). Even if true, that is simply because coercion may additionally require the use of leverage to influence one or more unrelated transactions. *Supra* Part II.A. It does not imply that concerted action is necessary. Florida Blue also cites (at 52) a single sentence from a floor debate stating that § 1013(b) would prohibit "every effective combination or agreement to carry out a program against the public interest." 91 Cong. Rec. 1471, 1486 (1945) (statement of Sen. O'Mahoney). Leaving aside the limited value of isolated floor statements, this argument confuses the necessary with the sufficient. That concerted action may qualify as coercion does not mean that only concerted action so qualifies.

[10] The leading treatise states that "lower courts have divided on the question," Areeda & Hovenkamp, *supra*, ¶ 220a & n.4, but that description appears overly generous. One district court declared 43 years ago without citation or analysis that "coercion" and "intimidation" reach "only such coercion and intimidation that would constitute an agreement or act of boycott," *Black*, 429 F. Supp. at 462, and another six years later parroted the quote, *Hopping v. Standard Life Ins. Co.*, No. GC81-167-LS-P, 1983 WL 1946, at *10 (N.D. Miss. Sept. 14, 1983). Not even Florida Blue cites those cases on this issue, presumably because they cannot be reconciled with the statute.

Finally, Florida Blue observes (at 51, 52-53 & n.12) that Congress enacted McCarran-Ferguson in response to the federal prosecution of an insurance conspiracy, arguing that the statute "must be understood in light of the conspiratorial conduct at issue in that case." But the Supreme Court rejected that argument more than 40 years ago, *see St. Paul*, 438 U.S. at 546-550; U.S. Br. 32, and that kind of "legal context" matters "only to the extent it clarifies text," *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001). It cannot justify reading into the word "coercion" a concerted-action requirement inconsistent with the text and structure of the statute.

The "coercion" exception thus does not require concerted action. But even if it did, the complaint adequately alleges that Florida Blue's exclusivity practices entailed concerted action. Either way, Florida Blue's challenged practices constitute "coercion" within any understanding of that word.

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

/s/ Seth P. Waxman

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March 23, 2020

ADDENDUM

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LACY THOMPSON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant.

COMPLAINT

CIVIL ACTION
FILE NO. C78-1149A

PLAINTIFF DEMANDS
TRIAL BY JURY

1.

The claims alleged herein arise under the antitrust laws of the United States, including Section 1 of the Sherman Act, as amended, 15 U.S.C. Section 1, and Section 4 of the Clayton Act, 15 U.S.C. Section 15. Jurisdiction of the Court rests upon Section 4 of the Clayton Act, 15 U.S.C. Section 15.

2.

Plaintiff is and at all times herein has been a citizen of the State of Georgia.

3.

Defendant is a corporation duly organized under the laws of the State of New York with its principal place of business in the State of New York. Defendant is, and at all times herein has been, authorized to do business in the State of Georgia and presently designates as its Georgia registered agent Mr. Oscar Blanks and as its Georgia registered office 2150 Park Lake Drive, N. E., Atlanta, Georgia 30345.

4.

Defendant was organized as a mutual life insurance

company in the year 1845 and subsequently has grown to be one of the world's largest mutual life insurance companies. Continuously throughout the 1956-1976 period here in question defendant has ranked fourth among life insurance companies in the United States as to size of assets ($6.2 billion in 1956, increasing to $14.8 billion in 1976).

5.

Defendant's operations are conducted throughout the fifty states of the United States and in Canada. The large majority of its current insurance contracts have been sold to insureds who at the time of contracting were citizens and residents of states other than defendant's aforesaid state of incorporation and principal place of business.

6.

Defendant presently has a roster of approximately 9,700 independent soliciting agents located throughout defendant's areas of operations. With each of said agents defendant has a contractual arrangement similar to that set out in Exhibit A, attached hereto.

7.

It is against the backdrop of the aforesaid disparity in economic power as between each of said agents and defendant that the actions hereinafter described are to be viewed.

8.

Effective as of June 1, 1956, plaintiff, then

twenty-five years of age, entered into a soliciting agent's contract with defendant, copy of which is attached hereto as Exhibit A.

9.

The aforesaid contract is defendant's standard form of soliciting agent's contract, regularly used by defendant in engaging each of the soliciting agents on its roster, the preparation, contents and publication of which are the sole handiwork of defendant carried out at its headquarters office in New York State.

10.

In the matter at hand said contract form was first signed by plaintiff at his home location in the State of Georgia, was thereupon delivered to defendant and signed on its behalf by its Contract Registrar located at defendant's New York State headquarters office (as provided under Section 22 thereof) and a duplicate posted in the mail in New York State for delivery to plaintiff in the State of Georgia.

11.

Under the terms of said contract form (Exhibit A hereof), each soliciting agent's relationship with defendant is established as solely that of an independent contractor (Exhibit A, Section 5 at Page 2), in business for himself and consequently his own master, free to work or not to work according to his own day to day inclinations and needs, free to operate without direction and control by defendant as to the persons from whom to solicit applications and as to time,

place, method and manner of solicitation and of performance under his agreement (see Exhibit B hereof, at Page 1).

12.

Thus by defendant's own contractual definition each of its soliciting agents constitutes an independent entrepreneur who is engaged by defendant for solicitation of applications from the general public to purchase defendant's insurance policies.

13.

Said soliciting agent's authority, however, is limited strictly to the solicitation of applications; and in no instance is the soliciting agent empowered to proceed beyond the point of obtaining and tendering to defendant, at its New York State headquarters office, offers from the general public to purchase defendant's policies, defendant retaining full and complete discretion as to either accepting or rejecting each such application tendered, as provided under Sections 2 and 20 of the soliciting agent's contract form (Exhibit A, Pages 1 and 8).

14.

The soliciting agent's only form of remuneration provided under said contract form consists of commissions on those sales which defendant elects to accept.

15.

Thus said soliciting agent, in procuring and tendering to defendant offers from the general public to

purchase defendant's policies, thereby as part and parcel of such transactions engages as an independent entrepreneur in negotiating the sale to defendant of his own procuring services, payment by defendant to said agent for procurement of those policy applications which defendant elects to accept being made to said agent in the form of policy commissions, as provided under Sections 13 through 17 of the soliciting agent's contract form, Exhibit A hereof.

16.

Under defendant's established procedures the determination regarding acceptance of policy applications tendered by soliciting agents is made at defendant's New York State headquarters office; and as to those applications which are accepted policies are issued at that office for delivery to policyholders.

17.

In the year 1956, contemporaneously with plaintiff's execution of the aforesaid soliciting agent's contract form (Exhibit A hereof), defendant from its New York State headquarters office proffered to plaintiff an additional contractual offer, termed the "Nylic" plan, as set out in defendant's standard form "Nylic No. 5" brochure, copy of which is attached hereto as Exhibit B. The preparation, contents and publication of said brochure were the sole handiwork of defendant carried out at its New York State headquarters office.

18.

Defendant's said "Nylic" plan (in various editions)

is provided by defendant to each and all of its soliciting agents. Said plan offers, as a quid pro quo, to each soliciting agent who complies with a series of five "Conditions" (Exhibit B, Page 2) annual remuneration (payable monthly) in the form of contingent deferred commissions to be calculated on the basis of total dollar amount of paid for and outstanding policies the applications for which have been procured for defendant by said agent in specified prior years.

19.

Said agent receives no form of remuneration from defendant other than the aforesaid payments made for services rendered in connection with procurement of policy applications which have been accepted by defendant.

20.

Defendant in its Nylic brochure (Exhibit B, Page 1) points out to its soliciting agents that

> "Experience has shown that the soliciting agent who persists, year after year, in soliciting applications for policies issued by one particular company and in rendering skilled service to policy holders is the agent who acquires a growing clientele of satisfied policy holders who generally utilize the services of that particular agent in obtaining whatever further life insurance they need."

21.

In direct confirmation of that observation, as plaintiff's solicitation efforts in his early years on behalf of defendant produced substantial fruit, plaintiff with increasing maturity was able to meet and exceed his Nylic required dollar volume of effected policy applications

(Exhibit B, Condition (e) at Page 2) and to expand gradually his sources of capital with decreasing expenditures of his time.

22.

In this circumstance, being an independent entrepreneur with already proven promotional skills, the opening of new doors to plaintiff for further entrepreneurial endeavors resulted, as hereinafter described.

23.

However, this favorable entrepreneurial setting (from plaintiff's viewpoint), fostering prospects for enhancement of competitive price bidding for plaintiff's maturing skills, posed potential problems from the viewpoint of defendant's interests.

24.

In reacting to these potential problems (which, of course, were in no way unique to plaintiff's particular situation but rather were common to defendant's relationship with each of the successful soliciting agents on its roster) defendant established certain coercive restraints against such entrepreneurs (a) by way of certain of the aforementioned "Conditions" set out in its Nylic brochure (Exhibit B hereof), and (b) in connection with termination provisions contained in its Soliciting Agent's Contract form (Exhibit A hereof).

25.

Thus defendant, through the fashioning and imposition

of Nylic "Condition (b)", coercively restrained plaintiff, in his status as an independent entrepreneur in business for himself, from seeking out or acting upon any other competitive price bid and remunerative opportunity for plaintiff's entrepreneurial skills, from any and every sector of the economy, as follows:

> "In order to qualify for membership in Nylic the soliciting agent must . . . (b) not engage in any other business or occupation for remuneration or profit during the contract year without the written consent of the Company."

while at the same time defendant was engaged in negotiating the purchase of those very skills.

26.

Said Nylic "Condition (b)" is found in each and every edition of defendant's Nylic brochure now in effect and thus is applicable at the present time to each of defendant's approximately 9,700 soliciting agents operating in all fifty states of the United States.

27.

In addition to the coercive restraint set out in Nylic "Condition (b)", defendant in its actual course of dealing under its contractual relationship with plaintiff made substantial use of the termination power found in Section 9 of the Soliciting Agent's Contract form (Exhibit A hereof) as an additional coercive countermeasure to reinforce its restraint against breach of Nylic "Condition (b)", as is more fully detailed hereinafter.

28.

The aforesaid coercive contractual restraints established by defendant against competitive price bidding for plaintiff's services as an independent entrepreneur in business for himself, which restraints were applied during that course of time in which defendant was engaged in making purchases from plaintiff of such services, constitute a per se violation under Section 1 of the Sherman Act, as amended, 15 U.S.C. Section 1.

29.

Plaintiff was engaged as a soliciting agent for defendant through the period from June 1, 1956, to December 12, 1976. In the spring of 1976 plaintiff received from defendant written notifications of plaintiff's attainment of Senior Nylic status (as defined in Exhibit B, at Page 6), copies of same being attached hereto as Exhibits C and D.

30.

Thereafter, in the summer of 1976, defendant announced in its official Soliciting Agents monthly publication, Nylic Review, that plaintiff had attained such Senior Nylic status. The preparation, contents and promulgation of said announcement in defendant's official publication were the sole handiwork of defendant performed at its New York State headquarters office and distributed to plaintiff in the State of Georgia and to each of defendant's approximately 9,700 other soliciting agents located throughout defendant's total area of operations.

31.

In the latter half of October, 1976, plaintiff received by mail from defendant a letter, copy of which is attached hereto as Exhibit E, advising that defendant was in the process of obtaining an investigative report on plaintiff. Said report was made in writing to defendant by Equifax Inc., dated October 26, 1976, copy of same being attached hereto as Exhibit F.

32.

In mid November, 1976, plaintiff received by mail from defendant a letter, copy of which is attached hereto as Exhibit G, stating in its opening paragraph as follows:

> "Your failure to qualify for Nylic for the past two Nylic years, in violation of the terms of your agreement with the Company, leaves me no alternative but to terminate your soliciting agent's Contract and Nylic membership. This decision was further influenced by an investigative consumer report which determined that you were actively engaged in other employment in violation of your Agreement with the Company. The report was made at our request by the Equifax Company, P. O. Box 100065, Atlanta, Georgia 30348."

33.

The "other employment" on which defendant in substantial measure based its termination decision concerned a motel operation located in the metropolitan Atlanta, Georgia area, adjacent to the Emory University Medical and Dental School facilities, the Emory Clinic Hospitals and the United States Government's National Center for Disease Control.

34.

The motel and an accompanying private office were

owned by plaintiff in his capacity as an independent entrepreneur in business for himself, these having been constructed for him in 1972. The private office was occupied by plaintiff as his base of operations from which to oversee his motel investment and to conduct his solicitations of policy applications for purchase of defendant's insurance.

35.

Plaintiff selected said motel and office site with two objectives in mind: (a) to secure close proximity and convenience of the motel facility for persons visiting the Emory Clinic Hospitals and the National Center for Disease Control, and (b) to further secure close proximity and convenience of plaintiff's New York Life Insurance sales office to a prime concentration of potential life insurance clients, consisting of the medical and dental school student bodies and the professional staffs of the National Center for Disease Control, the Emory Clinic Hospitals and Medical School and the Emory Dental School.

36.

As early as the year 1974 defendant, as regards plaintiff's satisfactory completion of his Nylic years, had waived the provision under Nylic "Condition (d)" that applications for the required $50,000 of new insurance be procured "within the contract year" and had extended the time period therefor an additional fifteen months.

37.

Further, based on the fact that plaintiff in an eighteen year span of his performance as a soliciting agent had procured new insurance applications accepted by defendant in total amounts averaging approximately $500,000 per year, defendant as of the end of plaintiff's twentieth Nylic year (June 30, 1976) again reaffirmed its waiver of said provision under Nylic "Condition (d)" that $50,000 of effected new insurance applications be procured "within the contract year".

38.

Thus, as hereinabove set out, through announcement in its official soliciting agents monthly publication, Nylic Review, in the summer of 1976 defendant designated plaintiff as a Senior Nylic on the basis that plaintiff thereafter would procure a total of $50,000 in effected new insurance applications for each of his nineteenth and twentieth Nylic years.

39.

In accordance with this arrangement plaintiff within the summer of 1976 had procured and delivered to defendant policy applications in a total amount of $50,000 covering plaintiff's nineteenth Nylic year; and at the very time that defendant in its letter of November 12, 1976 (Exhibit G hereof) acted to revoke such time limitation waiver and to terminate plaintiff's soliciting agent's contract and Nylic membership, plaintiff was awaiting the

performance of the medical examinations which defendant theretofore had arranged and scheduled for the said policy applicants.

40.

At the time defendant acted to revoke its time limitation waiver and to terminate plaintiff's soliciting agent's contract and Nylic membership, plaintiff stood ready and able to procure the remaining $50,000 total in new insurance applications to cover his twentieth Nylic year and thereafter to complete twenty-five and thirty Nylic years. Plaintiff was prevented from so doing solely as a consequence of the aforesaid actions taken by defendant.

41.

Plaintiff's breach of Nylic "Condition (b)", as heretofore described, was a substantial causal factor in triggering defendant's coercive countermeasures taken, as set out in defendant's November 12, 1976 letter (Exhibit G hereof (1) to revoke its earlier waiver of the provision under Nylic "Condition (d)" that the $50,000 of effected new insurance applications be procured "within the contract year", (2) to terminate plaintiff's soliciting agent's contract, and (3) to terminate plaintiff's Nylic membership.

42.

The actions of defendant, as above set out, constitute per se violations of the prohibition under Section 1 of the Sherman Act, 15 U.S.C. Section 1, as

amended, against contracts and combinations which have the effect of restricting, curtailing and interfering with the setting of prices by free market forces.

43.

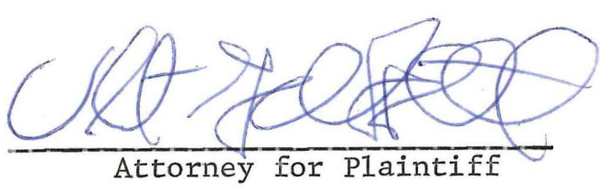
The actions of defendant, as above set out, have resulted in substantial direct monetary damages to plaintiff, the exact amount of which is based in part on defendant's Nylic formula calculations (as set out at Pages 6 and 7 of Exhibit B), all of the ingredients of which are not known presently to plaintiff, but are well known to defendant.

WHEREFORE, plaintiff respectfully demands judgment against defendant as follows:

(a) that defendant account to plaintiff for the amount of monthly income due plaintiff as a Senior Nylic, based upon an amount of $50,000 in new insurance to be applied to each of plaintiff's nineteenth and twentieth Nylic years;

(b) for monetary damages, past, present and future, based on loss of Nylic benefits and sales commissions resulting from termination of plaintiff's Nylic membership and soliciting agent's contract, all in such total amount as is provided under Section 4 of the Clayton Act, 15 U.S.C. Section 15;

(c) for reasonable expense reimbursements, as likewise provided under Section 4 of the Clayton Act, 15 U.S.C. Section 15.



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SOLICITING AGENT'S CONTRACT

(Form N5-56)

NEW YORK LIFE INSURANCE COMPANY (hereinafter called the Company) hereby authorizes Lacy Thompson (hereinafter called the Soliciting Agent) of Columbus in the County of Muscogee and State of Georgia to solicit applications for individual life insurance policies, individual annuity policies, pension trust policies, personal accident and sickness insurance policies, policies under the Employee Protection Plan, group insurance policies and group annuity policies, all on such plans as are issued by the Company at the time such applications are procured. It is mutually agreed that this authority is granted by the Company and accepted by the Soliciting Agent upon the following limitations, terms, provisions and conditions:

1. The Soliciting Agent is authorized to operate within that portion of the State of Georgia which is under the jurisdiction of the Company's Atlanta Branch Office located in the City of Atlanta, State of Georgia and, until further written notice from the Company, shall conduct his business with the Company through said Branch Office. The Soliciting Agent may operate in such other territory as the Company may, from time to time, authorize but shall have no exclusive right to solicit applications in any territory and shall have no authority to operate in any jurisdiction unless duly licensed under the laws of such jurisdiction to act as such Soliciting Agent.

2. The Soliciting Agent shall have no authority for or on behalf of the Company to accept risks of any kind, to make, modify or discharge contracts, to extend the time for paying any premium, to bind the Company by any statement, promise or representation, to waive forfeitures or any of the Company's rights or requirements, or to place the Company under any legal obligation by any act which is not within the authority granted by the Company in this contract or otherwise in writing.

3. The Soliciting Agent is authorized to collect first and single premiums on behalf of the Company only as follows:

(a) In connection with each application, including any supplementary application, procured by him the Soliciting Agent may collect an amount not exceeding the first premium for the policy applied for, or not exceeding the single premium if a single premium policy is applied for, but only if he delivers to the applicant in exchange therefor the coupon receipt attached to the application and corresponding therewith in date and number, and

(b) If the premium is not paid when the application is taken, the Soliciting Agent shall collect the first premium or the single premium, as the case may be, stated in the policy when the policy is delivered.

Except as authorized above, the Soliciting Agent shall have no authority to receive or collect for the Company any premiums or other moneys due or to become due to it.

4. All moneys received by the Soliciting Agent for or on behalf of the Company shall be received by him in a fiduciary capacity, shall not be used for any personal or other purpose whatsoever but shall be immediately paid over to the Company. When requested by the Company to do so, the Soliciting Agent shall advise the Company, in writing, with respect to the circumstances under which he delivered any policy and, with respect to any policy given to him for delivery on which the Company has not received any premium, whether the policy has been delivered or remains in his possession and whether he has collected any premium on the policy.

EXHIBIT A

(eight pages)

5. Neither the term "Soliciting Agent" (used herein solely for convenience in designating one of the parties) nor anything contained herein or in any of the rules or regulations of the Company shall be construed as creating the relationship of employer and employee between the Company and the Soliciting Agent. Subject to the provisions hereof and within the scope of the authority hereby granted, the Soliciting Agent, as an independent contractor, shall be free to exercise his own discretion and judgment with respect to the persons from whom he will solicit applications, and with respect to the time, place, method and manner of solicitation and of performance hereunder. But the Soliciting Agent agrees that he will not conduct himself in such a manner as to affect adversely the good standing or reputation of the Company.

6. The Soliciting Agent hereby (a) acknowledges receipt of the Company's booklet entitled "Soliciting Agent's Handbook" and agrees to observe and abide by the limitations of authority and the rules specified therein which apply generally to soliciting agents of the Company; (b) agrees that his rights to receive commissions as herein provided shall be further subject to the rules relating to commissions as contained in said booklet; and (c) agrees that, under the circumstances stated therein, he shall be liable for payment of the fees, charges and payments specified in said booklet. The agreements contained in this Section 6 shall extend to any changes in or additions to said limitations and rules, whether published in a new booklet or otherwise given to the Soliciting Agent by written notice, but no rule hereafter adopted shall be construed so as to restrict the Soliciting Agent's right to direct and control his work in the performance of this contract.

7. The Soliciting Agent agrees to reimburse the Company for all attorneys' fees, costs, expenses and losses of every kind which the Company may at any time incur or pay on account of any garnishment, attachment or other legal process or order of any kind which may be served upon the Company by reason of the existence of this or any other agency contract by and between the parties hereto or on account of any assignment applicable to any such agency contract.

8. The Company is hereby given a paramount and prior lien upon any commissions payable under this or any previous agency contract and under any and all agreements amendatory hereof or supplementary hereto, as security for the payment of any claim or indebtedness or reimbursement whatsoever due or to become due to the Company from the Soliciting Agent. Any sums becoming due to the Soliciting Agent at any time may be applied, directly, by the Company to the liquidation of any indebtedness or obligation of the Soliciting Agent to the Company, but the failure to so apply any sum shall not be deemed a waiver of the Company's lien on any other sums becoming due nor impair its right to so apply such sums.

9. Either party hereto may, with or without cause, terminate this contract upon written notice, said termination to become effective thirty days after the day on which such notice is dated.

10. In addition to the right of the Company to terminate this contract as provided in Section 9 above, the Company shall have the right, at its option, to terminate this contract immediately, upon the giving of written notice of such termination to the Soliciting Agent, for any one or more of the following causes:

(a) The collection or receipt by the Soliciting Agent of any moneys for or on behalf of, or due or to become due to, the Company except as authorized in Section 3 hereof.

(b) A withholding by the Soliciting Agent of any money collected or received for or on behalf of the Company, or of any policy or other document, after such money, policy or document shall have been demanded by the Company.

(c) Any act of the Soliciting Agent by which he, directly or indirectly, sells or offers to sell to any person or persons, policies issued by this Company at any deviation from the published rates of the Company as furnished to the Soliciting Agent by the Company from time to time.

(d) A violation by the Soliciting Agent of the anti-rebate laws of any State or jurisdiction.

11. Any failure of the Company in any instance to terminate this contract when cause for such termination exists, or to insist upon compliance with any of the limitations, terms, provisions and conditions of this contract, shall not be construed as a waiver of any of the Company's rights or of any of such limitations, terms, provisions and conditions, or of the right of the Company to thereafter enforce its rights or insist upon such compliance.

12. The rights, interests and claims of the Soliciting Agent against the Company arising under or growing out of this contract are not assignable, and no assignee shall acquire any rights thereto, without the written consent of the Company. The rights of an assignee under any assignment to which consent has been or may be given shall be subject to the paramount and prior lien given to the Company by Section 8 hereof.

13. **Commissions on Individual Life Insurance Policies, Individual Annuity Policies and Pension Trust Policies** — The Company shall pay to the Soliciting Agent, *subject to all the limitations, terms, provisions and conditions of this contract,* commissions on premiums received by the Company under individual life insurance policies, individual annuity policies and pension trust policies effected upon applications procured by the Soliciting Agent while this contract is in force, such commissions being at the applicable rates and for the policy years, or portions thereof, as specified in Tables I and II set forth below, except that the conditional renewal commissions as set forth in column (3) of Tables I and II shall not be payable unless the Soliciting Agent qualifies therefor by complying with the conditions stated in the succeeding paragraphs of this Section during the Contract Year (as defined in Section 23 hereof) in which the applications for such policies are procured.

In order to qualify for conditional renewal commissions, as set forth in column (3) of Tables I and II, on premiums under policies effected upon applications procured during any Contract Year, the Soliciting Agent must procure under this contract within that particular Contract Year applications upon which policies, on lives other than his own, are effected for at least $50,000 of new individual or pension trust life insurance which counts (as indicated in Tables I and II and otherwise in this contract and as may be hereafter indicated pursuant to the provisions hereof) for qualification for said conditional renewal commissions and upon which one full year's premium is paid in due course. If the total amount of such new insurance under such policies is less than $50,000, no renewal commissions on the premiums for such policies effected pursuant to applications procured by the Soliciting Agent during that particular Contract Year will be payable under this contract.

Any application in connection with which a medical examination is required by the Company shall be deemed to have been procured within the Contract Year in which the medical examination is made, except that, if any additional policy which requires no new medical examination is applied for, the date of the Soliciting Agent's request for the issue of such policy, if later than the date of the medical examination, shall govern as to the additional policy. The date on which a non-medical application is procured will determine the Contract Year in which it counts.

Policies on plans of insurance designated in Tables I and II as plans which do not count, policies on any plan of insurance which the Company may issue and which it states in writing will not count, and annuity policies will not count toward qualification for conditional renewal commissions. The Company may, at any time, change its designation of the plans of insurance which will and will not count toward such qualification by giving written notice of any such change to the Soliciting Agent but such change will apply only to policies effected upon applications submitted to the Company thereafter.

Any life or endowment policy preceded by term insurance (such as a Term-Whole Life or Term-Life Paid-up at Age 85 policy, an individual life or endowment policy preceded by Preliminary Term insurance, or a pension trust life insurance policy preceded by Introductory Term insurance) will count toward qualification for conditional renewal commissions on policies effected upon applications procured hereunder in the Contract Year in which the first year of insurance on the life or endowment policy commences provided the premium for such year of insurance is paid in full. However, conditional renewal commissions on any life or endowment policy preceded by term insurance will be payable on the premiums for the second year of insurance on the life or endowment policy only if the Soliciting Agent's production during the Contract Year when the application was actually procured qualified him for conditional renewal commissions.

Any policy on the Soliciting Agent's own life, any policy which lapses for non-payment of premium, is canceled, matures as a death claim or is otherwise terminated before one full year's premium is paid to and received by the Company, any policy which is issued and subsequently rescinded by the Company and any policy written on an application which the Soliciting Agent personally has not helped in procuring, will not count toward qualification for said conditional renewal commissions.

If the Soliciting Agent shares the commission on any policy with another duly authorized soliciting agent, he will receive credit for only a proportionate part of the policy's face amount. If a policy lapses for non-payment of premium before one full year's premium is paid, and is subsequently reinstated, it will count the same as though such lapse had not occurred.

TABLE I
COMMISSION RATES
(Expressed as percentages of Premiums received by Company)
INDIVIDUAL LIFE INSURANCE AND INDIVIDUAL ANNUITIES

(1) Plan	(2) 1st Yr. %	(3) Conditional Renewals 2d Year † %
Plans which COUNT FOR QUALIFICATION for any Conditional Renewal Commissions		
Whole Life	50	15
Life Modified Three	55	15
Life Paid-up at Age 85	55	15
Limited Payment Life, not listed elsewhere herein:		
Prems. payable for 40 yrs. or more	55	15
Prems. payable for 20 to 39 yrs., incl.	50	15
Prems. payable for 15 to 19 yrs., incl.	45	15
Prems. payable for 10 to 14 yrs., incl.	40	15
Joint Life Policies:		
Ordinary Life	55	15
20 Payment Life	50	15
Estate Builder (Insurance Builder in N.Y.)	50	15
Policies with Prem. Return to Age 10:		
30 Payment Life with Pure Endowment at end of 30 Years	45	15
20 Payment Life with Pure Endowment at end of 20 Years	35	15
20 Payment Endowment at Age 65:		
Ages at Issue, 0 to 25, inclusive	50	15
Ages at Issue, 26 to 30, inclusive	45	15
Ages at Issue, 31 to 35, inclusive	40	15
Ages at Issue, 36 to 44, inclusive	35	15
Endowments with premiums payable throughout period of Endowment, not listed elsewhere herein:		
Period 40 yrs. or more	55	15
Period 35 to 39 yrs., inclusive	50	15
Period 30 to 34 yrs., inclusive	45	15
Period 25 to 29 yrs., inclusive	40	15
Period 20 to 24 yrs., inclusive	35	15
Period 15 to 19 yrs., inclusive	30	12
Period 11 to 14 yrs., inclusive	25	9
Period 10 yrs.	20	9
Retirement Income Endowment at Age 60:		
Age at Issue, 20	40	15
Ages at Issue, 21 to 25, inclusive	36	15
Ages at Issue, 26 to 30, inclusive	33	12
Ages at Issue, 31 to 35, inclusive	30	12
Ages at Issue, 36 to 40, inclusive	26	9
Ages at Issue, 41 to 45, inclusive	23	9
Ages at Issue, 46 to 49, inclusive	20	9
Age at Issue, 50	15	6
Retirement Income Endowment at Age 65:		
Ages at Issue, 20 to 25, inclusive	45	15
Ages at Issue, 26 to 30, inclusive	40	15
Ages at Issue, 31 to 35, inclusive	36	15
Ages at Issue, 36 to 40, inclusive	32	12
Ages at Issue, 41 to 45, inclusive	28	9
Ages at Issue, 46 to 50, inclusive	24	9
Ages at Issue, 51 to 54, inclusive	20	9
Age at Issue, 55	15	6
Plans which DO NOT COUNT FOR QUALIFICATION for any Conditional Renewal Commissions		
Term-Whole Life and Term-Life Paid-up at Age 85:*		
1. On the Term premiums for:		
a. 2 or 3 Year Term period	30	—
b. 4 Year Term period	35	5
c. 5 Year Term period	40	5%: 2d & 3d Yrs.
2. On premiums for the stated years of insurance on the:		
a. Whole Life Plan	50	15
b. Life Paid-up at Age 85 Plan	55	15
5 Year Renewable Term:		
Ages at Issue, 18 to 50, inclusive	40	5%:2d-10th Yrs.
Ages at Issue, 51 to 55, inclusive	40	5%:2d-8th Yrs.
Age at Issue, 56	40	5%:2d-7th Yrs.
Age at Issue, 57	40	5%:2d-6th Yrs.
Age at Issue, 58	40	5%:2d-5th Yrs.
Age at Issue, 59	40	5%:2d-4th Yrs.
Term to Age 65:		
Ages at Issue, 18 to 50, inclusive	40	5%:2d-10th Yrs.
Ages at Issue, 51 to 55, inclusive	40	5%:2d-8th Yrs.
Mortgage Protection Term	40	5%:2d-6th Yrs.
Family Income and Mortgage Protection Riders	40	Same as for basic policy
Preliminary Term*	30	—
Child's Protection Benefit	Same as for basic policy	—
Retirement Annuity:**		
Ages at Issue, 0 to 35, inclusive	25	5%:2d-6th Yrs.
Ages at Issue, 36 to 40, inclusive	20	5%:2d-6th Yrs.
Ages at Issue, 41 to 45, inclusive	20	5%:2d-5th Yrs.
Ages at Issue, 46 to 50, inclusive	15	5%:2d-5th Yrs.
Ages at Issue, 51 to 55, inclusive	15	5%:2d-4th Yrs.
Ages at Issue, 56 & over	10	5%:2d-4th Yrs.

Single Premium:	*Single Commission*
Life, 15 and 20 Yr. Endowment & Endowment at Age 65	3% of the Single Premium
Life Annuity	2% of the Single Premium

†Unless otherwise stated. **Renewal commissions not conditional.
*See page 3, Section 13 for conditions under which Term-Whole Life, Term-Life Paid-up at Age 85 and insurance preceded by Preliminary Term will count toward qualification.

TABLE II
COMMISSION RATES
(Expressed as percentages of Premiums received by Company)
PENSION TRUST POLICIES

(1) Plan	(2) 1st Yr. %	(3) Conditional Renewals 2d Year † %
Plans which COUNT FOR QUALIFICATION for any Conditional Renewal Commissions		
Pension Income Endowment at Age 60:		
Ages at Issue, 21 to 25, inclusive	36	10
Ages at Issue, 26 to 30, inclusive	32	8
Ages at Issue, 31 to 35, inclusive	30	8
Ages at Issue, 36 to 40, inclusive	25	6
Ages at Issue, 41 to 45, inclusive	22	6
Ages at Issue, 46 to 49, inclusive	20	6
Age at Issue, 50	15	4
Ages at Issue, 51 to 53, inclusive	10	4
Ages at Issue, 54 and 55	5	2
Pension Income Endowment at Age 65:		
Ages at Issue, 21 to 25, inclusive	45	10
Ages at Issue, 26 to 30, inclusive	40	10
Ages at Issue, 31 to 35, inclusive	35	10
Ages at Issue, 36 to 40, inclusive	30	8
Ages at Issue, 41 to 45, inclusive	25	6
Ages at Issue, 46 to 50, inclusive	22	6
Ages at Issue, 51 to 54, inclusive	20	6
Age at Issue, 55	15	4
Ages at Issue, 56 to 58, inclusive	10	4
Ages at Issue, 59 and 60	5	2
Pension Income Endowment at Age 70:		
Ages at Issue, 61 to 63, inclusive	10	4
Ages at Issue, 64 and 65	5	2
Pension Income Endowment — 10 Years		
Ages at Issue, 56 to 65, inclusive	15	4
Life Insurance with Pension Option, and Pension Insurance:		
Ages at Issue, 21 to 25, inclusive	55	10
Ages at Issue, 26 to 30, inclusive	50	10
Ages at Issue, 31 to 45, inclusive	45	10
Ages at Issue, 46 to 50, inclusive	40	10
Ages at Issue, 51 to 55, inclusive	35	10
Ages at Issue, 56 to 65, inclusive	30	10
Plans which DO NOT COUNT FOR QUALIFICATION for any Conditional Renewal Commissions		
Pension Annuity:††		
Prems. pay. for 2 to 9 yrs., incl.	2	2**
Prems. pay. for 10 yrs.	10	5%:2d-4th Yrs.
Prems. pay for 11 to 14 yrs., incl.	15	5%:2d-4th Yrs.
Prems. pay. for 15 to 19 yrs., incl.	15	5%:2d-5th Yrs.
Prems. pay. for 20 to 24 yrs., incl.	20	5%:2d-5th Yrs.
Prems. pay. for 25 to 29 yrs., incl.	20	5%:2d-6th Yrs.
Prems. pay. for 30 yrs. or more	25	5%:2d-6th Yrs.
Deferred Premium Pension Annuity††		
All	2	2**
Introductory Term Insurance:*		
Prems. pay. for 1 to 3 yrs., incl.	30	—
Prems. pay. for 4 yrs.	35	5%:2d Yr.
Prems. pay. for 5 yrs.	40	5%:2d & 3d Yrs.

Single Premium:	*Single Commission*
Pension Annuity	2% of the Single Premium

†Unless otherwise stated. ††Renewal commissions not conditional. **To end of premium period.
*See page 3, Section 13 for conditions under which insurance preceded by Introductory Term Insurance will count toward qualification.

On all types and plans of individual life insurance, individual annuities and pension trust life insurance and annuities which the Company may issue and which are not included in Tables I or II, the commission shall be such as shall be designated in writing by the President, Executive Vice President or Vice President of the Company.

14. **Commissions on Personal Accident and Sickness Insurance Policies** — The Company shall pay to the Soliciting Agent, *subject to all the limitations, terms, provisions and conditions of this contract,* commissions on premiums received by the Company under policies of personal accident and sickness insurance effected upon applications procured by the Soliciting Agent while this contract is in force, such commissions being at the applicable rates as specified in Table III, set forth below.

TABLE III

COMMISSION RATES

(Expressed as percentages of Premiums received by Company)

PERSONAL ACCIDENT AND SICKNESS INSURANCE

Policy Year	Plan	Policy Period in Years			
		10 or more	9	8	7 or less
1	All except Hospital Expense	40%	40%	40%	40%
1	Hospital Expense	30	30	30	30
2	All	20	20	20	20
3	"	10	10	10	—
4	"	10	10	—	—
5	"	10	—	—	—

On all policies of personal accident and sickness insurance which the Company may issue and which are not included in Table III, the commission shall be such as shall be designated in writing by the President, Executive Vice President or Vice President of the Company.

After termination of this contract no renewal commissions will be paid on premiums thereafter received on personal accident and sickness insurance policies, effected upon applications submitted by the Soliciting Agent, except that, if such termination is by death of the Soliciting Agent, renewal commissions which would otherwise have become payable under this contract will be paid for a period of up to five (5) years after such death on premiums received for such policies during that period and except that, if such death occurs in the first policy year of any such policy, any balance of first-year commissions on such premiums received will be paid and also renewal commissions on premiums received on any such policy for the next five (5) policy years.

15. The Company may, at its option, change any rate of commission on individual life insurance and individual annuity policies, on pension trust policies and on personal accident and sickness policies, whether specified in Tables I, II or III or otherwise, by giving written notice to the Soliciting Agent and the new rate shall apply to all policies issued upon applications procured by the Soliciting Agent after such notice is given.

16. **Commissions on Policies under the Employee Protection Plan** — The Company shall pay to the Soliciting Agent, *subject to all the limitations, terms, provisions and conditions of this contract,* commissions on premiums which become due and are received by the Company on policies under Employee Protection Plans effected upon applications procured by the Soliciting Agent while this contract is in force. Such commissions shall be at the applicable rates as specified in Table IV, set forth below, and shall apply to the aggregate of all premiums paid for the coverages provided for in the Plan.

TABLE IV

COMMISSION RATES

(Expressed as percentages of Premiums received by Company)

EMPLOYEE PROTECTION PLAN

Portions of Premiums For Plan Year	First Plan Year	Plan Years 2-10	
		Part A	Part B
First $3,500	25%	4%	3%
Next 6,500	20	2	0
Next 10,000	12.5	1.5	0

Commissions applicable to any portion of the premiums for the Plan year in excess of $20,000 shall be payable at the applicable Normal Scale rates as specified in Table V (Commission Rates for Group Insurance), set forth below in Section 17.

First year commissions will vest in the Original Soliciting Agent who sells the Plan. Such Original Agent will receive both Part A and Part B commissions in accordance with the above table during the period he actively services the Plan to the satisfaction of the Company.

Part A commissions will be paid only to the Original Soliciting Agent who sold the Plan. No Part A commissions will be payable on premiums received after the termination of said Original Soliciting Agent's contract except that where such termination is by death of the Agent, Part A commissions will be paid, as they accrue, in accordance with Table IV, but in no event shall any such commissions be payable on any premium which becomes due more than 5 years after such Agent's death.

Part B commissions will be paid only to the Soliciting Agent who actively services the Plan to the satisfaction of the Company. No Part B commissions will be payable to a Soliciting Agent after he has received written notice from the Company that he is not properly servicing the Plan. After an Agent has been notified that he is not properly servicing a Plan, the Company may appoint a Succeeding Soliciting Agent who will be entitled to receive Part B commissions on premiums received while he is actively servicing the Plan to the satisfaction of the Company.

Commissions with respect to additions, extensions, liberalizations, reinstatements or replacements will be determined in accordance with the Company's rules and regulations (whether published or unpublished) which are in effect at the time of the addition or change.

All rates of commissions on Employee Protection Plans, whether specified herein or otherwise and any rules or regulations relating to such commissions, may be changed by the Company, at any time, without notice to the Soliciting Agent and the new rates, rules and regulations shall apply to policies issued on applications procured after the effective date of any such change.

17. **Commissions on Group Policies** (*other than Employee Protection Plan Policies*) — The Company shall pay to the Soliciting Agent, *subject to all the limitations, terms, provisions and conditions of this contract,* commissions on premiums received by the Company on policies of group insurance (other than Employee Protection Plan policies) effected upon applications procured by the Soliciting Agent while this contract is in force, such commissions, except as stated below, being at the applicable Normal Scale rates as specified in Table V set forth below. The Normal Scale rates will be payable unless the Soliciting Agent elects, at the time an application is submitted to the Home Office, to receive commissions under the Alternative Level Scale rates as specified in Table V set forth below and except that commissions with respect to

(a) Group insurance transferred from another insurer to the Company,
(b) Group insurance where the employee pays the entire premium, and
(c) Group insurance where the policy is issued to a union,

shall be payable *only* at the applicable Alternative Level Scale rates.

TABLE V
COMMISSION RATES
(Expressed as percentages of Premiums received by Company)
GROUP INSURANCE

Portion of Premiums for Policy Year	Normal Scale		Alternative Level Scale
	First Policy Year %	Second through Tenth Policy Years %	First through Tenth Policy Years %
First $1,000 or part thereof	20.0	5.0	6.50
Next 4,000 or part thereof	20.0	3.0	4.70
Next 5,000 or part thereof	15.0	1.5	2.85
Next 10,000 or part thereof	12.5	1.5	2.60
Next 10,000 or part thereof	10.0	1.5	2.35
Next 20,000 or part thereof	5.0	1.5	1.85
Next 200,000 or part thereof	2.5	1.0	1.15
Next 250,000 or part thereof	1.0	0.5	0.55
Next 2,000,000 or part thereof	0.5	0.25	0.275
Over 2,500,000	0.1	0.10	0.10

Commissions on premiums received for (1) group insurance policies on plans issued to comply with the law of any state requiring payment of disability benefits to employees and (2) group annuity policies shall be such as are specified in writing by the President, Executive Vice President or Vice President of the Company.

All rates of commissions on group insurance and group annuity policies, whether specified in Table V or otherwise, and any rules or regulations relating to such commissions, may be changed by the Company, at any time, without notice to the Soliciting Agent and the new rates, rules and regulations shall apply to policies issued on applications procured after the effective date of any such change.

Commissions with respect to (a) group insurance additions, extensions, liberalizations, reinstatements or replacements and (b) group insurance underwritten jointly by the Company and another insurer or reinsured, in whole or in part, by another insurer shall be determined in accordance with the Company's rules and regulations (whether published or unpublished) which are in effect at the time of the addition, change or underwriting.

18. Except as provided in Sections 14 and 16 hereof, the termination of this contract, whether by death or otherwise, shall in no way affect the right of the Soliciting Agent to receive, on policies effected pursuant to applications procured by him while this contract is in force, any commissions which the Soliciting Agent would have been entitled to receive hereunder if this contract had not been terminated.

19. Any commissions payable under this contract after the Soliciting Agent's death shall be credited to his account, as they become due, and be payable to his executors, administrators or assigns after deduction therefrom of any indebtedness or obligation of the Soliciting Agent to the Company.

20. Nothing in this contract, or any amendment thereof or supplement thereto, nor in any of the printed literature or forms of the Company shall impair the Company's right to the full and free exercise of its judgment in acting upon any application for an insurance or annuity policy; and the Soliciting Agent shall have no right to any commission for submitting any application upon which no insurance or annuity policy is effected with the Company.

21. Written notice to the Soliciting Agent under this contract or any amendment thereof or supplement thereto may be given by mail or by publication in any official Agency publication or bulletin of the Company or by any other means, except that a notice under Section 9 or Section 10 hereof shall not be given by means of such publication. If the written notice to the Soliciting Agent is given by mail, it shall be deemed to have been given when duly addressed and mailed to the last known post-office address of the Soliciting Agent, postage prepaid. If such notice is given by publication, it shall be deemed to have been given whenever published as above.

22. This contract shall take effect as of the 1st day of March 19 57 if duly signed by the Soliciting Agent and countersigned on behalf of the Company by a Contract Registrar at its Home Office.

23. The first Contract Year under this contract shall commence on the effective date stated in Section 22 above and end in the following calendar year with the last day of the calendar month specified in said effective date. Each subsequent Contract Year shall be a period of twelve (12) consecutive calendar months ending in each succeeding calendar year with the last day of said calendar month. Section 23 modified by amendment dated 3-1-57.

IN WITNESS WHEREOF, the parties to this contract have subscribed their names hereto and to a duplicate hereof.

Witnessed by _____
Inspector of Agencies

_____
Soliciting Agent

NEW YORK LIFE INSURANCE COMPANY

By _____
Executive Vice President

Countersigned for New York Life Insurance Company
on March 22, 1957 by

_____
Contract Registrar.

January, 1956. Printed in U.S.A.

NYLIC
No. 5

INTRODUCTORY STATEMENT

The name "Nylic" is derived from the initial letters of the several words which make up the corporate name, New York Life Insurance Company (hereinafter sometimes called the Company).

"Nylic" as used herein is not an abbreviated name for the corporation and does not refer to the Company, but instead is simply a name for the plan or system described herein under which an eligible soliciting agent of the Company may become a member of a body of persistent and successful agents and receive the benefits of such membership. *Wherever the word "Nylic" is used herein it is to be construed and read as if written "Nylic No. 5".*

The soliciting agents of New York Life Insurance Company who are eligible to qualify for membership in Nylic are in business for themselves. They are their own masters. Within the authority granted by his agency contract and subject to the provisions thereof, the soliciting agent is free to operate without direction and control by the Company as to the persons from whom he will solicit applications and as to the time, place, method and manner of solicitation and of performance under his agency contract. To succeed, such a soliciting agent must have or acquire the executive ability necessary to direct and control effectively the performance of his work.

The soliciting agent's freedom of action and the fact that his earnings are measured by the results produced by him are, and should be, two of the greatest incentives for a persistent and sustained production of new business. Of course, when a man is free to work or not to work according to his own day to day inclinations and needs, this freedom itself may, in some instances, constitute a danger to a persistent and sustained effort. Although the agency contract of soliciting agents who are eligible to qualify for membership in Nylic provides for the payment of liberal commissions based on results produced. Nylic supplies an additional incentive or inducement for a persistent and sustained production by every eligible agent of new life insurance which will have a high degree of persistency from year to year.

Experience has shown that the soliciting agent who persists, year after year, in soliciting applications for policies issued by one particular company and in rendering skilled service to policyholders is the agent who acquires a growing clientele of satisfied policyholders who generally utilize the services of that particular agent in obtaining whatever further life insurance they need. Nylic offers to an eligible soliciting agent who persists in soliciting and producing applications for policies issued by New York Life Insurance Company, year after year, the opportunity to receive specified benefits based on results produced by him if he complies with the conditions and rules of Nylic. Such benefits are in addition to the commissions which are provided for in the soliciting agent's contract.

Whether he shall endeavor to comply with the conditions which must be complied with to qualify for membership in Nylic is a matter for the soliciting agent, acting as his own master, to decide. If he does not qualify for membership in Nylic he shall not become entitled to receive any of the benefits of Nylic. If he becomes a member of Nylic and continues to qualify for such membership during each consecutive Contract Year, he shall belong to that group of soliciting agents who, through persistent and effective efforts, have achieved a measure of success and shall be entitled to receive benefits as herein provided, subject to all the terms, provisions, conditions and rules of Nylic.

DEFINITIONS

Contract Year. — The term "Contract Year" as used herein means a Contract Year of the soliciting agent as such Year is defined in his agency contract.

Nylic Year. — The term "Nylic Year" as used herein means a Contract Year with respect to which the soliciting agent shall have complied with the conditions (a) to (e) inclusive, and with condition (f) where applicable, set forth under the following heading.

EXHIBIT B

(seven pages)

CONDITIONS WHICH MUST BE COMPLIED WITH TO QUALIFY FOR MEMBERSHIP IN NYLIC

In order to qualify for membership in Nylic the soliciting agent must, with respect to one Contract Year, comply with each and all of the following conditions. The soliciting agent must

(a) operate, continuously during the Contract Year, under the Company's agency contract form N5 or any subsequent form of agency contract designated by the President, Executive Vice President, Senior Vice President or a Vice President of the Company as one under which the soliciting agent shall be eligible to qualify for Nylic membership,

(b) not engage in any other business or occupation for remuneration or profit during the Contract Year without the written consent of the Company,

(c) not represent any other insurance company nor place any application for life or any other type of insurance or annuity with any other insurer during the Contract Year without the written consent of the Company,

(d) procure under his agency contract within the Contract Year, applications upon which policies on lives other than his own are effected with the Company for not less than the total amount of fifty thousand dollars ($50,000) of new insurance which counts for qualification for Nylic —as such insurance is defined in, or in accordance with, the General Rules hereinafter set forth—and upon which one full year's premium is paid in cash to and received by the Company in due course (such insurance being hereinafter referred to as "paid-for insurance which counts in Nylic"),

(e) comply continuously during the Contract Year with all of the terms, provisions, conditions and rules of Nylic, except condition (f) which must be complied with as provided therein, and

(f) if he is not already a member of Nylic and has complied with said conditions (a) to (e) inclusive during the Contract Year, make written application for membership in Nylic, on a form of application prescribed by the Company for the purpose, as soon as practicable after completion of the Contract Year.

GENERAL RULES

1. Any soliciting agent who, with respect to one Contract Year, has complied with all of the foregoing conditions (a) to (f) inclusive and become a member of Nylic, must, in order to continue to be a member of Nylic, comply with each and all of said conditions (a) to (e) inclusive with respect to each subsequent Contract Year, and if he fails at any time, with respect to any subsequent Contract Year before becoming a Senior Nylic, to comply with each and all of said conditions (a) to (e) inclusive, he shall automatically cease to be a member of Nylic.

2. Only life insurance policies issued on individual applications shall count for Nylic. Term insurance, whether issued by policy or rider, Single Premium insurance, annuities and any other policies which the Company states in writing shall not count for Nylic, shall not count for Nylic. Any Term-Whole Life or Term-Life Paid-up at Age 85 policy, if effected upon an application procured while the soliciting agent's contract referred to in condition (a) above is in force, will count for Nylic as if it were a new Whole Life or Life Paid-up policy when the premiums for the Whole Life or Life Paid-up at Age 85 are paid, and for the purpose of determining whether the soliciting agent has complied with condition (d) above, the application for such a policy will be deemed to have been procured within the contract year in which the Term period ends and not within the Contract Year when actually procured. Insurance on a soliciting agent's own life, if written in accordance with the rules herein contained, will count in Nylic provided it is not required to bring the amount up to the qualifying amount in any year.

3. A policy upon which a monthly, quarterly or semi-annual premium shall have been paid to and received by the Company will ultimately be counted, subject to the conditions and rules of Nylic, provided the deferred portions of the first year's premiums are duly paid to and received by the Company. Any policy which,

before this has been done, lapses for non-payment of premium, is canceled, matures or is otherwise terminated will not be counted.

4. Policies issued and subsequently rescinded by the Company shall not count for Nylic.

5. Only policies effected pursuant to applications personally procured by the soliciting agent will count in Nylic. If a case is written personally by a soliciting agent, and part of the commission under his agency contract is allowed to another duly authorized soliciting agent, a proper deduction will be made. Thus, if a soliciting agent pays out one-third of his commission in this way, he will receive credit for only two-thirds of the policy's face value. If on the other hand, a soliciting agent receives an application which he personally has not helped in procuring he will not receive any credit whatever for the same, no matter what portion of his commission he allows to the party who procured the application.

6. A policy which has lapsed by non-payment of premium and is subsequently reinstated will count, subject to the conditions and rules of Nylic, the same as though such lapse had not occurred.

7. Any application in connection with which a medical examination is required by the Company shall not be deemed to have been procured until the medical examination is made and the date on which such examination is made will determine the Contract Year in which the policy effected pursuant to such application counts, except that if any additional policy which requires no new medical examination is applied for, the date of the soliciting agent's request for the issue of such policy, if later than the date of the medical examination, shall govern as to it and except that the Contract Year in which any Term-Whole Life or Term-Life Paid-up at Age 85 policy will count shall be determined as stated in Rule 2 above.

8. No salaried employee and no person receiving a salary for a part or all of his time can qualify for membership in Nylic.

9. Any member of Nylic who becomes incapacitated for work of any kind on account of temporary illness may, upon establishing to the Company's satisfaction the fact that said temporary illness was of such a character as to prevent his qualifying for membership in Nylic during any Contract Year, have such Contract Year entirely eliminated from his Nylic record, leaving his future Nylic status to be adjusted by the Company accordingly but with due effect given to any Nylic payments actually made during such Contract Year, or, at the option of the Company, be allowed to qualify for membership in Nylic during such Contract Year on the basis of the lower volume of business actually produced.

10. The Company shall have a paramount and prior lien upon all sums payable under Nylic to secure the payment of any indebtedness of the soliciting agent to the Company, and may apply any sums becoming due directly to the liquidation of any such indebtedness, but the Company's failure so to apply such sums shall not be deemed a waiver of its lien on other sums becoming due, or impair its right to apply such sums to the liquidation of any such indebtedness.

11. The benefits of Nylic are not assignable, and no assignee shall acquire any rights thereto, without written consent of the Company given by its President, Executive Vice President, Senior Vice President or a Vice President. The rights of an assignee under any assignment to which consent may be given shall be subject to the paramount and prior lien given to the Company by Rule 10 hereof.

12. The Company reserves the right in its discretion, at any time and from time to time, to alter, amend or repeal any and all of the terms, provisions, conditions and rules of Nylic as herein expressed; provided, however, that such changes shall be effective as regards future business only. No change shall be made which increases the amount of new insurance which a member, under these conditions and rules, in good standing shall be required to effect in order to maintain membership, nor shall any adverse change be made in the basis of Nylic income benefits to such member.

13. The termination of the agency contract of any member of Nylic, whether with or without cause, prior to becoming a Senior Nylic, shall automatically terminate his Nylic membership.

14. In addition to the provisions for the automatic termination of Nylic membership under Rules 1 and 13, the Company may by written notice terminate any soliciting agent's Nylic membership for failure to comply with, or the violation of, any other Nylic rule or condition.

15. The termination of a soliciting agent's Nylic membership under any of the terms, provisions, conditions or rules of Nylic, whether by virtue of the termination of his agency contract or otherwise, shall terminate

all his rights and benefits under Nylic and no further payments of any kind shall become due on account of Nylic. Should said soliciting agent again become a member of Nylic no credit whatsoever shall be allowed because of his former membership.

16. If any member of Nylic shall die or shall become entitled to income payments under the "Physical Incapacity" provisions hereof or shall cease to be a member of Nylic, whatever Nylic monthly income such member may have been receiving shall terminate with the last monthly payment due prior thereto, except as provided with respect to disabled Senior Nylics. See page 8.

17. The Company may, at its discretion, when convinced that any of the Nylic conditions and rules act unfairly upon a soliciting agent in an individual case, because of special conditions or peculiarities surrounding it, make such exceptions in his behalf as are deemed advisable. The making of such exceptions shall not thereafter act as a waiver of any of the conditions and rules of Nylic.

BENEFITS AND DEGREES OF MEMBERSHIP

Freshmen Nylics

Any soliciting agent not already a member of Nylic who with respect to one Contract Year complies with the conditions which must be complied with to qualify for membership in Nylic shall become a Freshman Nylic and his Nylic membership shall date from the first day of such Contract Year.

Subject to all of the terms, provisions, conditions and rules of Nylic, a Freshman Nylic will receive monthly, beginning one month after the day on which his second consecutive Nylic Year ends, from New York Life Insurance Company an income arrived at as follows:

During the 3d year of continuous membership in Nylic the monthly income shall be equal to $0.40 per thousand on the amount of paid-for insurance which counts in Nylic during the first of such consecutive Nylic Years, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the second consecutive Nylic Year.

During the 4th year of continuous membership in Nylic, the monthly income shall be equal to $0.40 per thousand on the amount of paid-for insurance which counts in Nylic during the second consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the third consecutive Nylic Year.

During the 5th year of continuous membership in Nylic the monthly income shall be equal to $0.40 per thousand on the amount of paid-for insurance which counts in Nylic during the third consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the fourth consecutive Nylic Year.

(For illustration see page 10 hereof.)

Nylics of the First Degree

Any member of Nylic who completes five consecutive Nylic Years shall thereupon become a Nylic of the First Degree.

Subject to all of the terms, provisions, conditions and rules of Nylic, a Nylic of the First Degree will receive monthly, beginning one month after the day on which his fifth consecutive Nylic Year ends, from New York Life Insurance Company an income arrived at as follows:

During the 6th year of continuous membership in Nylic the monthly income shall be equal to $0.60 per thousand on the amount of paid-for insurance which counts in Nylic during the first of such consecutive Nylic Years, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the fifth consecutive Nylic Year.

During the 7th year of continuous membership in Nylic the monthly income shall be equal to $0.60 per thousand on the amount of paid-for insurance which counts in Nylic during the second consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the sixth consecutive Nylic Year.

During the 8th year of continuous membership in Nylic the monthly income shall be equal to $0.60 per thousand on the amount of paid-for insurance which counts in Nylic during the third consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the seventh consecutive Nylic Year.

During the 9th year of continuous membership in Nylic the monthly income shall be equal to $0.60 per thousand on the amount of paid-for insurance which counts in Nylic during the fourth consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the eighth consecutive Nylic Year.

During the 10th year of continuous membership in Nylic the monthly income shall be equal to $0.60 per thousand on the amount of paid-for insurance which counts in Nylic during the fifth consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the ninth consecutive Nylic Year.

(For illustration see page 10 hereof.)

Nylics of the Second Degree

Any member of Nylic who completes ten consecutive Nylic Years shall thereupon become a Nylic of the Second Degree.

Subject to all of the terms, provisions, conditions and rules of Nylic, a Nylic of the Second Degree will receive monthly, beginning one month after the day on which his tenth consecutive Nylic Year ends, from New York Life Insurance Company an income arrived at as follows:

During the 11th year of continuous membership in Nylic the monthly income shall be equal to $0.80 per thousand on the amount of paid-for insurance which counts in Nylic during the sixth consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the tenth consecutive Nylic Year.

During the 12th year of continuous membership in Nylic the monthly income shall be equal to $0.80 per thousand on the amount of paid-for insurance which counts in Nylic during the seventh consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the eleventh consecutive Nylic Year.

During the 13th year of continuous membership in Nylic the monthly income shall be equal to $0.80 per thousand on the amount of paid-for insurance which counts in Nylic during the eighth consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the twelfth consecutive Nylic Year.

During the 14th year of continuous membership in Nylic the monthly income shall be equal to $0.80 per thousand on the amount of paid-for insurance which counts in Nylic during the ninth consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the thirteenth consecutive Nylic Year.

During the 15th year of continuous membership in Nylic the monthly income shall be equal to $0.80 per thousand on the amount of paid-for insurance which counts in Nylic during the tenth

consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the fourteenth consecutive Nylic Year.

(For illustration see page 11 hereof.)

Nylics of the Third Degree

Any member of Nylic who completes fifteen consecutive Nylic Years shall thereupon become a Nylic of the Third Degree.

Subject to all of the terms, provisions, conditions and rules of Nylic, a Nylic of the Third Degree will receive monthly, beginning one month after the day on which his fifteenth consecutive Nylic Year ends, from New York Life Insurance Company an income arrived at as follows:

During the 16th year of continuous membership in Nylic the monthly income shall be equal to $1.00 per thousand on the amount of paid-for insurance which counts in Nylic during the **eleventh** consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the fifteenth consecutive Nylic Year.

During the 17th year of continuous membership in Nylic the monthly income shall be equal to $1.00 per thousand on the amount of paid-for insurance which counts in Nylic during the **twelfth** consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the sixteenth consecutive Nylic Year.

During the 18th year of continuous membership in Nylic the monthly income shall be equal to $1.00 per thousand on the amount of paid-for insurance which counts in Nylic during the **thirteenth** consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the seventeenth consecutive Nylic Year.

During the 19th year of continuous membership in Nylic the monthly income shall be equal to $1.00 per thousand on the amount of paid-for insurance which counts in Nylic during the **fourteenth** consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the eighteenth consecutive Nylic Year.

During the 20th year of continuous membership in Nylic the monthly income shall be equal to $1.00 per thousand on the amount of paid-for insurance which counts in Nylic during the **fifteenth** consecutive Nylic Year, after deducting from same the amount thereof which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to and including the end of the nineteenth consecutive Nylic Year.

(For illustration see page 11 hereof.)

Senior Nylics

After 20 Consecutive Nylic Years.—Any member of Nylic who completes twenty consecutive Nylic Years shall thereupon become a Senior Nylic. Beginning one month after the day on which his twentieth consecutive Nylic Year ends, a Senior Nylic shall receive, so long as he lives, provided only that he does not enter the service of any other life insurance company, a Senior Nylic monthly income arrived at as follows:

(A) The amounts of insurance which formed the respective bases for the incomes received during the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th years of continuous Nylic membership will be added together and divided by 15.

(B) It will then be ascertained in which one of the 16th, 17th, 18th, 19th and 20th consecutive Nylic Years the amount of paid-for insurance which counts in Nylic was the greatest and the

yearly amounts of such insurance which counts in the remaining four of said five consecutive Nylic Years will be added together and divided by 4 to obtain an average yearly amount for such four lowest years, and from that average yearly amount will be deducted a percentage thereof to cover a fair average of lapses, cancellations, maturities and other terminations, arrived at by the following formula:

The paid-for total insurance which counts in the 16th, 17th, 18th and 19th consecutive Nylic Years will be added together, and the total of said insurance which has lapsed, been canceled, matured or otherwise terminated on or before the end of said 20th consecutive Nylic Year will be ascertained. The ratio of said total lapsed, canceled, matured and otherwise terminated insurance to said total paid-for insurance will be taken as the aforesaid fair average percentage.

(C) The sums obtained in (A) and (B) will be averaged and the Senior Nylic monthly income will be $1.00 per thousand on the average amount thus obtained.

After 25 Consecutive Nylic Years.—If any Senior Nylic continues to comply with the conditions (a) to (e) inclusive, set forth hereinabove on page 2, until he has completed twenty-five consecutive Nylic Years, the Senior Nylic monthly income which he shall receive thereafter so long as he lives, provided only that he does not enter the service of any other life insurance company, shall be the Senior Nylic monthly income prescribed above after twenty consecutive Nylic Years increased by $0.25 per thousand on the average amount which was obtained pursuant to (C) above.

After 30 Consecutive Nylic Years.—If any Senior Nylic, who has completed twenty-five consecutive Nylic Years, continues to comply with the conditions (a) to (e) inclusive, set forth hereinabove on page 2, until he has completed thirty consecutive Nylic Years, the Senior Nylic monthly income which he shall receive thereafter so long as he lives, provided only that he does not enter the service of any other life insurance company, shall be the Senior Nylic monthly income prescribed above after twenty-five consecutive Nylic Years increased by

(I) $0.25 per thousand on the average amount which was obtained pursuant to (C) above, plus

(II) an additional monthly income arrived at as follows:

(a) The amount of paid-for insurance which counts in Nylic during the 21st, 22d, 23d, 24th and 25th consecutive Nylic Years, less the respective amount of lapses, cancellations, maturities and other terminations therefrom up to and including the end of the 25th, 26th, 27th, 28th and 29th consecutive Nylic Years, respectively, will be determined, and the sum will be divided by 5 to obtain an average yearly amount.

(b) The average yearly amount of paid-for insurance which counts in Nylic during the 26th, 27th, 28th, 29th and 30th consecutive Nylic Years will then be determined, and from that amount will be deducted a percentage thereof to cover a fair average of lapses, cancellations, maturities and other terminations arrived at by the following formula:

The paid-for total insurance which counts in the 26th, 27th, 28th and 29th consecutive Nylic Years will be added together, and the total of said insurance which has lapsed, been canceled, matured, or otherwise terminated on or before the end of the 30th consecutive Nylic Year will be ascertained. The ratio of said total lapsed, canceled, matured and otherwise terminated insurance to said total paid-for insurance will be taken as the fair average percentage for this purpose.

(c) The sums obtained in (a) and (b) will be averaged and said additional monthly income will be $0.70 per thousand on the average amount thus obtained.

Senior Nylic income payments shall terminate with the last monthly payment due prior to the death of the Senior Nylic or, if the Senior Nylic shall enter the service of any other life insurance company, the last monthly payment due prior thereto.

(For illustrations of Senior Nylic monthly income see pages 12 and 13 hereof.)

NEW YORK LIFE INSURANCE COMPANY 51 MADISON AVENUE, NEW YORK, NEW YORK 10010, TELEPHONE: (212) 576-6335

NYLIC REVIEW

FRED J. HECK, C L U , EDITOR

April 8, 1976

Mr. Lacy Thompson, CLU
ATLANTA GENERAL OFFICE

Dear Mr. Thompson:

Congratulations on attaining Senior Nylic status.

As you know, it's our custom to publish pictures of all new Senior and Senior Post Nylics in the Nylic Review.

We would really like to have a new, glossy, professional black and white photo of you for this purpose. We will need it in our office by May 5, 1976.

We will be happy to pay $10 toward the cost of a new photo and will send you a check as soon as we receive the picture. Because we must operate within a budget framework, we cannot offer to pay the whole bill. So, there's no need to send us the photographer's bill with the picture.

We hope you will take us up on our offer, and can get the picture to our office on or before May 5, 1976.

Sincerely,

John Graetzer

JJG:hg

John J. Graetzer

EXHIBIT C

IMPORTANT INSTRUCTIONS FOR ORIGINATOR

1. If subject is about a policy, be certain to give / number, mode of premium payment, full name of i :d and date to which premiums are paid.
2. Include subject matter as Loan Decrease, Divid , PAB, Nyla, C-O-M, etc.
3. Confine message to one subject.
4. Retain copy 2 and forward copies 1 and 3.

NB 4538 F68217/M

NEW YORK LIFE
INTER-OFFICE MEMO

7882 6-73

TO	NAME AND OFFICE, DIVISION OR DEPARTMENT MR. LACY THOMPSON, CLU ATLANTA GENERAL OFFICE	DATE 5/15/76	PREMIUMS PAID TO	1
FROM	NAME AND ORIGINATING OFFICE, DIVISION OR DEPARTMENT Helen Revans, Office Assistant Marketing Training & Development Room 1210	SUBJECT Senior Nylic Designation		

MESSAGE

On 7/1/76 you will be declared a Senior Nylic. Congratulations on this achievement.

The Company is planning to present you with an attractive gold wrist watch and a Senior Nylic Certificate mounted on an attractive plaque. The words "Senior Nylic" appear on the dial of the watch and your name and the date you become a Senior Nylic will be engraved on the back.

So that we may have the engraving done as you prefer, please print your name, exactly as you wish it to appear, on the bottom of this memo and return it to me as soon as possible.

Reply—(Replier: write reply and return copy 3 to originator. Retain or destroy copy 1)

DATE _____ SIGNATURE _____ OFFICE, DIVISION OR DEPARTMENT _____

EXHIBIT D

NEW YORK LIFE INSURANCE COMPANY 51 MADISON AVENUE, NEW YORK, NEW YORK 10010, TELEPHONE: (212) 576-6084

MARKETING DEPARTMENT
PHILIP M. REILLY, MANAGER
NYLIC BENEFITS DIVISION

October 18, 1976

Mr. Lacy Thompson
5604 Bahia Mar Cir
Stone Mountain 30083

Dear Mr. Thompson:

Notice Under Fair Credit Reporting Act

In accordance with the Fair Credit Reporting Act, you are entitled to know that an investigative consumer report may be made. This report could include information as to your employment, general reputation, personal characteristics and mode of living obtained through personal interviews with friends, neighbors and associates. If you would like additional information, I will be glad to supply a complete and accurate disclosure of the nature and scope of the investigative consumer report upon receipt of your written request within a reasonable period of time.

Sincerely yours,

Philip Reilly

Manager

EXHIBIT E

Acct. No. [redacted]

Agcy-Br. ns
Pol.-File # ns

Atlanta OFFICE

10-26-76 22 21

THOMPSON, LACY
Stone Mountain, Ga 5604 Bahia Mar Cir.

REPORT FROM (If not city in heading) (State whether former addr., etc.)

PERSONAL PROGRESS -SPECIAL
Kind of report INVESTIGATION

Date of Birth 4-16-31
Coverage —

Class —

PURPOSE: The purpose of this report was to determine the time spent in business interests of the applicant, other than with your company.

BUSINESS: We have determined that Mr. Lacy Thompson, is at the Clifton Towers Hotel, located at 1501 Clifton Road, NE, Atlanta, Georgia, and can be reached between the hours of 7:30 AM to 4PM and 6 to 7:30 PM.

015/wpg

EXHIBIT F

NEW YORK LIFE INSURANCE COMPANY

51 MADISON AVENUE, NEW YORK, NEW YORK 10010, TEL: (212) 576-5031

JOHN O. GAULTNEY, CLU, VICE PRESIDENT

November 12, 1976

Mr. Lacy Thompson
5604 Bahia Mar Cir
Stone Mountain, Georgia 30083

Dear Mr. Thompson:

Your failure to qualify for Nylic for the past two Nylic years, in violation of the terms of your agreement with the Company, leaves me no alternative but to terminate your soliciting agent's Contract and Nylic membership. This decision was further influenced by an investigative consumer report which determined that you were actively engaged in other employment in violation of your Agreement with the Company. The report was made at our request by the Equifax Company, P.O. Box 100065, Atlanta, Georgia 30348.

In certain instances in which the contract of a Third Degree Nylic is terminated, the Company makes a settlement under the hardship provision of the Nylic rules. In your case, we have determined that you would be eligible for a settlement in the amount of $6,041. This amount represents the commuted value of 60 monthly payments which in accord with our formula is based on 95% of the average of the Nylic payments you received in the Third Degree of Nylic through the end of your 19th year. As you well know, however, you have outstanding a special ledger debit in excess of $22,000 resulting from commission adjustments on policy numbers 33-518-561 and 34-596-715. Therefore, the amount of the settlement will be applied to reduce your indebtedness to the Company. Moreover, the Company will exercise its contractual lien against any future credits accruing to your account until the indebtedness is satisfied.

EXHIBIT G

(two pages)

In view of the foregoing, the New York Life hereby terminates your soliciting agent's Contract dated March 1, 1957 in accordance with Section nine of that contract. This termination is to be effective December 12, 1976.

Sincerely yours,

John O. Gaultney

Vice ~~President~~

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LACY THOMPSON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant.

CIVIL ACTION

FILE NO. _____

PLAINTIFF'S FIRST SET OF INTERROGATORIES

Plaintiff requests that the defendant, by an officer or agent thereof, answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure the following interrogatories:

1.

State the date on which defendant's earliest Nylic plan was first offered to its soliciting agents.

2.

Please state:

(a) the date on which defendant first adopted in its Nylic plan, as a condition of qualification therefor, any restriction which in any manner concerned a soliciting agent's engaging in any other business or occupation for remuneration or profit;

(b) the exact terminology of said original restriction;

(c) the name and present address of each person who participated in any manner in the drafting or in the determination to adopt said restriction;

(d) a description of the nature of participation of each such person;

(e) the date, name of the sender, name of the recipient, a description of the contents and the name and present address of the custodian of each letter, memorandum or other writing prepared by or directed to each such person which relates in any manner to the drafting or adoption of said restriction.

3.

Please state:

(a) the date or dates of any subsequent amendments or other modifications made by defendant in the aforesaid original restriction;

(b) the exact terminology of each such amendment or other modification;

(c) the name and present address of each person who participated in any manner in the drafting or in the determination to adopt each such amendment or other modification;

(d) a description of the nature of participation of each such person;

(e) the date, name of the sender, name of the recipient, a description of the contents and the name and present address of the custodian of each letter, memorandum or other writing prepared by or directed to each such person which relates in any manner to the drafting or adoption of each such amendment or other modification.

4.

Please state:

(a) the name, official position and present address of the person or persons who, acting on behalf of

defendant, requested the investigative report on plaintiff, as described in Exhibit E attached to plaintiff's complaint;

(b) the date of such request;

(c) the name and present address of the person to whom such request was directed;

(d) whether such request was oral or written, and if written, the name and address of the custodian of same or any copy thereof;

(e) each item of information possessed by said requesting person or persons which in any manner prompted the initiation of said request;

(f) the full content of each such item of information;

(g) the date on which said requesting person or persons received each such item of information;

(h) the name and present address of source from which each such item of information was received;

(i) whether the form of each such item of information was oral or written or both, and if written, the name and address of the present custodian thereof.

5.

Please state:

(a) each item of information possessed by John O. Gaultney which in any manner prompted or contributed to his initiation of the letter of November 12, 1976, Exhibit G of plaintiff's complaint;

(b) the full content of each such item of information;

(c) the date on which Mr. Gaultney received

each such item of information;

(d) the name and present address of the source or sources from which Mr. Gaultney received each such item of information;

(e) whether the form of receipt of each such item of information by Mr. Gaultney was oral or written or both, and if written, the name and present address of the present custodian thereof;

(f) the name and present address of each person, other than those already named in your responses to this question No. 5, with whom Mr. Gaultney conferred or corresponded in any manner and at any time on or before November 12, 1976, relating to the subject matter of said letter of November 12, 1976;

(g) the date and content of each such communication cited in your response to subparagraph (f), next above, whether same was oral or written or both, and if written, the name and present address of the person who has custody thereof.

6.

Please state:

(a) the name, official position, and present address of the person or persons who, acting within the scope of their authority on behalf of defendant, directed the publication during the summer of 1976 in defendant's Nylic Review of the announcement as to plaintiff's having attained Senior Nylic status;

(b) the date of such directive;

(c) the name and present address of the person

or persons to whom such directive was delivered;

(d) whether such directive was oral or written or both, and if written, the name and present address of the custodian thereof;

(e) each item of information possessed by said directing person or persons which in any manner prompted the initiation of said directive;

(f) the full content of each such item of information;

(g) the date on which such person or persons received each such item of information;

(h) the name and present address of the source or sources from which each such item of information was received;

(i) whether the form of receipt of each such item of information was oral or written or both, and if written, the name and present address of the custodian thereof;

(j) the name and present address of each person, other than those already named in your responses to this question No. 6, with whom the aforesaid directing person or persons conferred or corresponded in any manner and at any time prior to December 18, 1976, regarding said publication during the summer of 1976 in defendant's Nylic Review of the announcement as to plaintiff's having attained Senior Nylic status;

(k) the date and content of each such communication cited in your response to subparagraph (j), next above, whether same was oral or written or both, and if written, the name and present address of the person who has custody thereof.

7.

Please state the date as of which plaintiff was adjudged by defendant to have completed satisfactorily his eighteenth (July 1, 1973 - June 30, 1974) Nylic year.

8.

Please state:

(a) the name of the insured, the face amount of the policy and the policy number for each policy which was credited by defendant toward plaintiff's satisfactory completion of his eighteenth Nylic year;

(b) the dates on which, as to each of the aforesaid policies, the application therefor was received by defendant and the policy was issued by defendant.

9.

Please describe by name of soliciting agent, location of branch office, date of Nylic membership termination and nature of restricted activity engaged in, each instance in which defendant, throughout the entire period of operation of its Nylic plan, has terminated a soliciting agent's Nylic membership on any ground relating to such agent's having engaged in some other business or occupation for remuneration or profit.

10.

Please describe by name of soliciting agent, location of branch office, date of issuance of defendant's written approval and nature of additional activity engaged in by such agent, each instance in which defendant, throughout the entire period of operation of its Nylic plan, has given its written consent to a soliciting agent's engaging in any other business or occupation for remuneration or profit.

11.

Please describe by name of soliciting agent, location of branch office, date of defendant's denial of consent and nature of activity sought to be engaged in by such agent, each instance in which defendant, throughout the entire period of operation of its Nylic plan, has declined to grant its written consent to a soliciting agent's request that such agent be allowed to engage in an additional business or occupation for remuneration or profit.

12.

Please give the date and a description of the contents of each and every document prepared by or for defendant in the period from July 1, 1956 to December 18, 1976, which discusses in any manner the subject of plaintiff's entitlement to Nylic benefits.

13.

Please set out a step by step calculation of the monthly Senior Nylic benefits to which plaintiff would be entitled commencing with the month of July, 1976, based on (a) plaintiff's actual sales record in his initial eighteen Nylic years (July 1, 1956 - June 30, 1974) and (b) assuming Nylic credit to plaintiff for procurement of $50,000 (both in initial Nylic volume and persisting insurance) in sales of defendant's permanant life insurance policies for each of the nineteenth and twentieth Nylic years.

14.

Please state as to each life insurance application which had been at any time procured by plaintiff and which thereafter was recorded in defendant's New Business Ledger

on or after October 15, 1975, the name of the applicant, the date of application, the amount and kind of life insurance for which such application was made and the date of recording in said New Business Ledger.

15.

Please state as to each of the twelve months of the calendar year 1976 the amount of Nylic income which was credited by defendant to plaintiff's account.

Attorney for Plaintiff

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Decatur, Georgia 30030

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, the brief contains 6,443 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Seth P. Waxman
SETH P. WAXMAN

March 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Seth P. Waxman
Seth P. Waxman