Twin City Fire Ins. Co. v Arch Ins. Group, Inc.
2011 NY Slip Op 33866(U)
July 12, 2011
Sup Ct, New York County
Docket Number: 602062/09
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KORNREICH PART 54

JUSTICE SHIRLEY WERNER KORNREICH Justice

TWIN CITY et al

- v -

Rock Drum et al

INDEX NO. 602062/09

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	36, 37, 38, 39
Answering Affidavits — Exhibits	43, 44, 45
Replying Affidavits	46, 47

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed opinion.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/12/11

JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

JUSTICE SHIRLEY WERNER KORNREICH

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YOR
COUNTY OF NEW YORK: IAS PART 54

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TWIN CITY FIRE INSURANCE COMPANY, HARTFORD INSURANCE COMPANY OF ILLINOIS, HARTFORD INSURANCE COMPANY OF THE MIDWEST, TRUMBULL INSURANCE COMPANY, HARTFORD INSURANCE COMPANY OF THE SOUTHEAST, NUTMEG INSURANCE COMPANY, PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD, HARTFORD FIRE INSURANCE COMPANY, HARTFORD CASUALTY INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY INSURANCE COMPANY, HARTFORD UNDERWRITERS INSURANCE COMPANY, PACIFIC INSURANCE COMPANY, LIMITED, and THE HARTFORD FINANCIAL SERVICES GROUP, INC.,

Plaintiffs,

-against-

ARCH INSURANCE GROUP, INC., ARCH CAPITAL GROUP LTD., DAVID McELROY, JOHN RAFFERTY and MICHAEL PRICE,

Defendants.

----------x

Index No.: 602062/09
DECISION & ORDER

KORNREICH, J.:

Plaintiffs (collectively, Hartford) bring this action against defendants Arch Insurance Group., Inc. and Arch Capital Group Ltd. (collectively, Arch), a competitor, and defendants David McElroy, John Rafferty and Michael Price, former senior executives of Hartford's Financial Products division (HFP) and present employees of Arch. Plaintiffs, now, move, pursuant to CPLR 3211(a) (1) and (7), for an order dismissing, in part, the counterclaims of defendants McElroy, Rafferty and Price (collectively, the Individual Defendants), and dismissing, in their entirety, the counterclaims of defendants Arch.

I. *Facts*

A. Complaint

The following facts are taken from the complaint, unless otherwise stated.

McElroy retired, effective June 5, 2009, from his position as a senior vice president of Hartford and president of HFP. On June 8, 2009, Arch announced that McElroy would head its newly-formed Financial and Professional Liability Group. Hartford contends that a large corporate raid on and disparagement of Hartford ensued, resulting in HFP's loss of 60 employees comprising more than 25% of HFP's workforce and virtually all of its senior management. Additionally, it asserts that Rafferty and Price, then vice presidents of HFP, resigned from HFP within days of McElroy's retirement and followed him to Arch. Hartford alleges that, subsequently, HFP employees were directly solicited by Arch, HFP clients and prospects were misappropriated, and a significant amount of HFP's intellectual capital was transferred, for no consideration, to Arch. Hartford seeks to enjoin Arch's alleged improper conduct and recover damages caused thereby.

B. Counterclaims

In their four counterclaims, the Individual Defendants "seek relief for Hartford's improper (a) failure and refusal to pay to [them] compensation that they have earned and to which they are entitled, as well as (b) failure and refusal to indemnify, and repudiation of its obligation to indemnify, [them] for expenses, including attorneys' fees, incurred in connection with this litigation." Individual Defendants' Counterclaims, ¶1. The following facts are taken from the Individual Defendants' counterclaims, unless otherwise stated, and presumed true for the purposes of this motion.

The Individual Defendants admit they are former officers of HFP and that McElroy also served as an officer of other Hartford subsidiaries. They claim that when they, former employees of Reliance Insurance, commenced employment at Hartford in 2000, they accepted below-market salaries in consideration for Hartford's agreement to pay additional salary in the form of deferred compensation. The Individual Defendants describe these deferred plans as including the Hartford Financial Products Annual Cash Incentive & Profit Contribution Plan (the Old Plan), the 2007 Hartford Performance Annual Cash Incentive & Profit Contribution Plan (the New Plan), The Hartford Performance Unit Plan (the PU Plan) and The Hartford 2005 Incentive Stock Plan (the 2005 Stock Plan) (collectively, the Deferred Compensation Plans). According to the Individual Defendants, they received compensation under the Plans from 2000 to 2009.

McElroy gave notice of his retirement on May 1, 2009 and retired on June 5, 2009. He contends he has not received any deferred compensation since.

The Individual Defendants further contend that Hartford applied to the federal government's Troubled Assets Relief Program (TARP) and received preliminary approval on or about May 14, 2009. As a result, on June 2 or 3, Hartford told Rafferty and Price that they were required "to sign a waiver and release of all rights and claims [they] had against Hartford with respect to any prospective changes to [their] compensation or benefits that might result from Hartford's receipt of TARP monies – which changes might include prohibitions and/or further deferrals of their entitlements under the Deferred Compensation Plans." Ans., para. 23. They were given until June 10, 2009 to sign the waivers. Rafferty resigned on June 9, and Price resigned on June 10. They contend that they have received no deferred compensation since.

The counterclaims describe the Plans:

5. Pursuant to the Old Plan and the New Plan, a certain percentage of the profits from business written at HFP during any given year was to be set aside and placed in an annual profit pool. A portion of this annual profit pool was to be used to fund deferred compensation awards to certain employees, including the Individuals, through the issuance of "profit contribution units." Participants were to receive cash payouts in regular installments based on the number of profit contribution units they had earned.

6. Pursuant to The Hartford Performance Unit Plan, certain Hartford employees, including the Individuals, were to receive "Performance Units." After a vesting period, performance units were to result in cash payments based on a per unit monetary valuation.

7. Pursuant to The Hartford 2005 Incentive Stock Plan, certain Hartford employees, including the Individuals, were to receive "restricted stock" of Hartford Financial, which could be exchanged for common stock of Hartford Financial after a designated period, as well as "restricted stock units," each of which constituted the contractual rights to receive common stock of Hartford Financial after a designated period.

The Individual Defendants also claim that Sections 4.1(a) and 4.6 of Hartford Financial's Amended and Restated By-Laws obligate it to indemnify its former officers and employees for litigation "by reason of the fact that he or she was an officer, employee or agent of Hartford Financial." Ans., para. 34. Moreover, they claim that the By-Laws entitle former officers and employees to be indemnified for all lawyer and litigation expenses and entitle them to advance payments as the litigation proceeds.

The Individual Defendants allege causes of action for breach of contract under the Deferred Compensation Plan on behalf of McElroy (First Cause of Action), breach of duty of good faith and fair dealing on behalf of Rafferty and Price in regard to the Compensation Plans (Second Cause of Action), breach of contract under the By-Laws on behalf of the Individual Defendants (Third Cause of Action) and unjust enrichment on behalf of the Individual Defendants as to the monies not paid them pursuant to the Deferred Compensation and as to indemnification for the litigation fees (Fourth Cause of Action).

Arch's three counterclaims sound in: (1) indemnification for Hartford's refusal to pay and Arch's payment of the Individual Defendants' and Catherine Kelly's (another former HFP and current Arch employee) compensation allegedly owed to them under the Old Plan and the New Plan; (2) indemnification for Hartford's refusal to pay and Arch's payment of the Individual Defendants' costs and expenses, including attorneys' fees, incurred in connection with the instant action; and (3) indemnification for Hartford's unjust enrichment. Arch's claims are based on certain terms of its employment agreements with the Individual Defendants and Kelly, in which Arch agreed (a) to pay the Individual Defendants and Kelly the amounts, if any, they would have received from Hartford under the Old and New Plans, to the extent that Hartford does not make such payments; and (b) to indemnify the Individual Defendants and hold them harmless against any liability, including reasonable attorneys' fees, incurred by them as a result of a claim by Hartford arising out of their commencement of employment with Arch.

C. Documentary Evidence Submitted by Plaintiff

July 2003 (Old Plan)

The parties stated at oral argument that no formal document existed outlining the Old Plan. Rather, a powerpoint presentation and informal letters describing the plan were submitted by plaintiffs.

Powerpoint

Plaintiffs submit a July 2003 Powerpoint entitled "Hartford Financial Products Bonus Program" (Powerpoint). The Powerpoint describes the program as providing "Individual bonus awards" based "on your manager's assessment of your performance" (Powerpoint, p. 2), which would reflect "individual performance and contribution to HFP's profit results." *Id.* at 3, 17. It warns that some employees will "receive zero awards" and that the award would reflect results

achieved by the employee, the difficulty and the employees contribution to HFP. *Id.* at 4. Moreover, the Powerpoint states that the bonuses in each pool of insurance would be calculated over seven years to reflect the results of the insurance pools, with different percentages of the pool paid out each year. *Id.* at 6-16.

The Powerpoint explains that payments are made on an annual basis, usually by March 31 of the following year, and describes those eligible as employees having "satisfactory performance." *Id.* at 18. Also,

> "[i]ndividuals transferred to HFP will be eligible for a full payment under the HFP pool calculation. Those individuals hired during the first quarter are eligible for full payment; those hired during 2nd quarter are eligible for pro-rata payment; and those hired after October 1 (4th quarter) are not eligible. Active employees must have worked a continuous six months to be eligible for payment. Individuals on leave at time of payment will be eligible to receive payment upon return to work. Individuals who resign during the year are ineligible for payments; those who resign after December 31 (during the first quarter of the following year) are eligible for payments. Individuals who terminate due to job elimination or retirement (after July 1) *may* be eligible for a prorated payment. [emphasis added]

Id. Again, the Powerpoint emphasizes that "no one is entitled to any payment," that Hartford Management retains full control over decisions regarding payment and eligibility of "this bonus program," and that Hartford could change the program at any time. *Id.*

McElroy Letters

Plaintiffs submit two 2007, two 2008 and three 2009 letters written by plaintiff McElroy to defendant Price, defendant Rafferty and a Bryan Berkman, describing the Old and New Plans. In his February 16, 2009 letter to Bryan Berkman describing the Old and New Plans, McElroy wrote:

> ...you must remain an active employee of HFP and/or The Hartford organization at large at the time of actual payment to receive any awards. Please understand any provision of the *Old Plan and New Plan* or your eligibility for an award does not constitute a guarantee of employment in any fashion or for any fixed period

> of time, nor does it modify the at-will status of any employee. In the event of a dispute regarding the rationale, calculation and/or payment of any amounts under the *Old Plan or New Plan.* The Hartford retains full control over decisions regarding the interpretation of the formulae, eligibility, payments and administration related to participation. Furthermore, no one is contractually entitled to any payment and The Hartford reserves the right to amend or terminate the *Old Plan or New Plan* at any time. Once again, thank you for your contribution to the success of HFP and for allowing me this opportunity to provide you an update to your *Old Plan and New Plan* award picture.

McElroy wrote three letters to Rafferty, describing the Old and New Plans, in 2007, 2008 and 2009. In a May 24, 2007 letter, he explained that the Old Plan had been replaced with the New Plan in 2007. He wrote:

> ...This New Plan will provide all regular, active HFP employees the opportunity to earn an annual incentive award (first payable in March 2008), and for qualifying HFP employees, profit contribution units (first awarded in March 2008 with first potential payable in March 2010). New Plan information is available under separate cover.
>
> In addition to any New Plan awards you may earn, the sunset of the Old Plan leaves you eligible for trailing awards based upon your contributions to the establishment, success and profitability of HFP from its formation through 2006 performance year. Please understand that due to plan design the longer-term nature of ultimate profitability calculations, the remaining, unpaid award pool from the Old Plan is not fully quantifiable at this time....
>
> * * * *
>
> ...You must remain an active employee of HFP and/or The Hartford organization at large at the time of actual payment to receive any award(s). Please understand any provision of the sunset of the Old Plan or the entitlement to an award does not constitute a guarantee or contract of employment in any fashion or for any fixed period of time, nor does it modify the at-will status of any employee. In the event of a dispute regarding the rationale, calculation and/or payment of any amounts under the Old Plan, The Hartford retains full control over decisions regarding the interpretation of the formulae, eligibility, payments and administration related to participation. Furthermore, no one is contractually entitled to any payment and The Hartford reserves the right to amend or terminate the Old Plan at any time. Thank you for your contributions to the success of HFP to date and for allowing me the opportunity to provide some clarity to your Old Plan incentive award picture.

In the 2008 and 2009 letters to Rafferty, McElroy repeats the paragraph beginning with "Please," in which he admonishes that entitlement to an award is not a guarantee of employment

and that payment calculations under the Old Plan are at Hartford's discretion and could be terminated. The last paragraph describing the Old Plan as an "incentive plan" is also repeated. The same three letters were sent by McElroy to Price.

2007 Powerpoint

This Powerpoint has a page marked "Disclaimer," in which it states that the "incentive plans" are discretionary and for eligible HFP employees. *Id.* at 2. The Powerpoint asserts that "[n]othing in the incentive plans described herein constitute a guarantee of employment for any specific duration or period of time," that employment is terminable at will and that the "plans may be modified or cancelled at anytime without prior notice." *Id.* The Powerpoint states that awards depend on business results, individual performance, eligibility and the success of Hartford. *Id.* at 3. Reviewing the key components of the "2007 HFP Incentive Plan," the Powerpoint first addresses "Annual Incentives." *Id.* at 4. It enumerates those: actual awards are determined by individual accomplishments annually and HFP's annual performance; payouts during the first quarter following the performance year; and eligibility. *Id.* Referring to the "Multi-year Profit Contribution" Plan, it states that this plan "[p]rovides opportunity for select HFP employees to receive units in an annual profit pool tied to the long-term development of the book business." *Id*

Addressing the Annual Incentive plan, the Powerpoint explains that awards are discretionary and contingent on satisfactory performance. *Id.* at 8. As to eligibility, a table is provided which, *inter alia*, states that an individual who voluntarily resigns before the payout date is not eligible but that one who retires is eligible "prorated based on number of months eligible." *Id.*

In regard to the "Multi-Year Profit Contribution Plan" (New Plan), the Powerpoint specifies the "[a]nnual issuance of 'units' based on individual contributions and subsequent payout of units over time [which] establishes visible value – encouraging retention of critical talent." *Id.* at 10. Eligible participants are defined as "[a]ll regular, active employees" in specific tiers, and the units received depend on "acceptable or better performance." *Id.* at 11. Receipt of units are contingent upon receiving an award from the HFP annual plan and are at management's discretion. *Id.* at 15. " Payments...are considered to be a long-term deferred award and thereby do not count toward earnings under the company's Retirement Plan(s) or the 401(k) savings & Investment Plan." *Id.* Those who voluntarily terminate their employment "forfeit all units and future interest in the annual profit pool." *Id.* Involuntary termination retains eligibility for 12 months, and retirees vest. *Id.* The 2007 Powerpoint addresses the transition from the Old Plan to the New Plan, setting forth what would be paid through 2011 under the Old Plan. *Id.* at 17.

New Plan

2007 Writing

A 2007 writing setting forth the plan, is submitted. It reflects what was presented in the 2007 Powerpoint. It explicitly states that the plan "is intended to engage participants to actively drive growth and retention of profitable business, while fostering the retention of key employees..." 2007 Written Plan, p. 1; *see id.* also at 1 ("intended to reward participants for the successful stewardship of the business, support retention of key employees..."), 7 ("to encourage employee retention"). It repeatedly notes that awards are at managements' discretion (*id.* at 1, 3, 5, 6), refers to the awards as incentive payments (*id.* at 1, 2, 3, 5, 6, 9), and provides for discretionary revision or termination of the award. *Id.* at 3, 5, 9. The Plan provides that if an

employee is terminated for cause or resigns, "all units and future interest in the annual pool(s) will be forfeited." *Id.* at 8. "If the termination of employment is due to retirement ..., the participant ... shall fully and immediately vest at the next immediate scheduled payment date based on the calculated unit value of the pool at that time." *Id.* at 8. The table provided in the written plan describes a retiree as "[e]ligible" and his award as "[p]rorated based on number of months eligible." *Id.* at 4.

January 2009 Restatement of New Plan

The 2009 Restatement of the New Plan is similar to the power point and 2007 writing. The Plan is described as comprised of two components – (1) an annual cash incentive; and (2) the profit contribution which "may provide additional future compensation to certain eligible roles" based on business during the calendar year. 2009 Restatement, p. 1. Payments are to be made over a five year period following the year the insurance was written (*id.* at 6) and awards are not earned at the time distributed but distributed from an annual profit pool with 50% paid out following the third year, 75% following the fourth year, and 100% following the fifth year. *Id.* at 7. Again, the description states that those who voluntarily resign are not eligible for the yearly distribution and retirees are eligible for a "[p]ro-rated" amount. *Id.* at 8.

Stock Plan

Two documents are submitted regarding the Stock Plan. The purpose of the plan is described as motivating and rewarding key employees at the discretion of the Committee. A key employee is defined in the documents as an Eligible Employee, including an officer, whose responsibilities and decisions directly affect the performance of the Company. Section 6(f) of the documents provides:

If a Key Employee terminates service ...during a Performance Period or any

> applicable Restriction Period...(iii)solely in the case of a Key Employee with an original hire date before January 1, 2002, because of his or her voluntary termination of employment due to Retirement, ..., that Key Employee may, as determined by the Committee, be entitled to payment.... If a Key Employee terminates service with all Participating Companies during a Performance Period or any applicable Restriction Period for any other reason, then such Key Employee shall not be entitled to any Award with respect to the Performance Period and shall forfeit any shares of Stock subject to the Restriction Period unless the Committee shall otherwise determine.

PU Plan

The document submitted for the PU Plan contains the same language as cited above in regard to the Stock Plan.

D. Argument

Hartford

Hartford contends that the Individual Defendants' counterclaims fail for several reasons. First, according to Hartford, the incentive compensation awards under the Plans are discretionary. Hartford maintains that, given the Individual Defendants' breaches of fiduciary duty and other malfeasance, it is not surprising that, in March 2010, when Hartford distributed annual discretionary bonus compensation and stock incentives under the Plans, it chose not to award the Individual Defendants any post-employment incentive compensation.

Second, according to Hartford, payment under the Plans is tied to continued employment at Hartford. Hartford contends that the language of the Plans and the applicable law mandate that the Individual Defendants' counterclaims under the Plans must be dismissed. It asserts that the Individual Defendants' claims to further compensation under the Plans are contradicted by the explicit language of the Plans, which grants Hartford's board and management discretion regarding payments thereunder. Moreover, Hartford points out that McElroy, while president of HFP, repeatedly confirmed in writing that no employee had a right to any bonus compensation

until such compensation was actually paid. Hartford asserts that, because Rafferty and Price resigned, they were not eligible to receive bonus compensation, even aside from the issue of discretion. Further, Hartford refutes Rafferty's and Price's claim that they were forced to resign – constructively terminated. According to Hartford, it needed the funds from TARP to continue to operate. To obtain such funding, the 25 most highly compensated individuals in Hartford's 30,000-employee workforce, were required to execute federally mandated documentation which would have resulted in pay cuts. Rafferty and Price chose to resign rather than sign the TARP documents.

Finally, Hartford asserts that the Individual Defendants have not suffered any damage, as they have been made whole for any lost incentive compensation as a part of their compensation from Arch. However, as noted below at II(A) and in oral argument, if the Individual Defendants earned the money they are claiming as wages, the money cannot be forfeited. *See Ryan v Kellogg Partners Institutional Servs.*, 79 AD2d 447, 448 (1st Dept 2010). On the other hand, if the money was a discretionary bonus, they will not be entitled to it. *See Gruber v J.W.E. Silk, Inc.*, 52 AD3d 339, 340 (1st Dept. 2008). The compensation the Individual Defendants obtained from Arch is immaterial. This argument, thus, is without merit.

In sum, Hartford contends that all of the Individual Defendants' claims that relate to incentive compensation - the first and second counterclaims, and the fourth counterclaim, to the extent it refers to the first two counterclaim - should be dismissed. It argues that the third counterclaim, and that part of the fourth counterclaim relating to the third counterclaim, which seek indemnification and advancement of legal fees, also are meritless and will be addressed at another time.

Individual Defendants

The Individual Defendants explain that they joined HFP in 2000, when Hartford purchased Reliance Group Holdings, an insurance company that went into liquidation and became HFP. They contend that, at Hartford's request, they agreed to accept below-market cash salaries from Hartford in consideration for its agreement to pay them, in addition to their salaries, certain deferred compensation based on the profitability of their endeavors. Defendants maintain that the deferred compensation was to be paid pursuant to what evolved into the Plans. The Individual Defendants state that the compensation was, in part, paid and distributed to them while they were at HFP. They maintain that, at the time they left HFP, they had earned, and were owed by Hartford, substantial additional payments and distributions under the Plans.

Defendants explain that, under the Old Plan, pools were created as to the book of business HFP wrote each year from 2000 onward, and each such pool for each such year was paid out over the course of seven years, based on set formulas applied to the pre-tax profitability of each year's book of business as the seven-year period unfolded. They assert that each participating HFP employee's awards under the Old Plan reflected his or her individual performance and contribution to HFP's results. The Old Plan applied to, and remains in place with respect to, years 2000 through 2006. In 2007, Hartford replaced the Old Plan with the New Plan, under which HFP employees continued to share in HFP's profitability, but on a post-tax basis, with payouts as to the profitability of each business year made only in the third through fifth years, after the conclusion of that year.

Defendants note that, when the New Plan was put into effect, the Old Plan was adjusted to conclude by March 2011, and Hartford allocated to each participant in the Old Plan a set percentage of the pools yet to be paid out thereunder. They contend that, after the set

percentages were allocated to the employees, all payouts under the Old Plan were to be made strictly pursuant to such percentages.

Defendants point out that neither the Old Plan nor the New Plan was reduced to one comprehensive writing. They state that some of the plans' terms were explained in summary documents shown and/or distributed to employees, while other terms were a matter of understandings between Hartford management and HFP employees. According to defendants, under both the Old and New Plans, the awards of employees who retire or who are terminated without cause are immediately and fully vested.

Defendants explain that the PU Plan and the 2005 Stock Plan provide additional compensation to HFP senior management. They state that, under those plans, interests awarded vest 100% at the end of a three-year period, and a retiring employee or an employee terminated without cause is entitled to receive a pro-rated award for the portion of the three-year period during which he or she was actively employed.

The Individual Defendants argue that the awards made to them under the Plans cannot be taken away in Hartford's discretion. They assert that Hartford's position that it is entitled to withhold such awards is contrary to the terms of the Plans, to the interpretation and practice of Hartford when administering those plans, and to Hartford's promise that their deferred compensation awards over time would make up for their sacrifice of immediate cash compensation.

II. Discussion

A. Arch's Counterclaims

Hartford argues that Arch's counterclaims should be dismissed in their entirety because they fail to state a cognizable claim. Hartford specifically notes that Arch *chose* to enter into

employment packages that would reward the Individual Defendants in the event that they did not receive compensation from Hartford under the Old and New Plans. In any case, according to Hartford, it has no relationship with Arch that would make it liable for Arch's compensation decision and Arch owed no duty to pay the employees. Hartford, therefore, argues that all of Arch's counterclaims should be dismissed.

Indemnification occurs where the liability of one party shifts to another. *Mas v Two Bridges Assocs.*, 75 NY2d 680, 690 (1990). The shift of liability arises from a duty owed to the indemnitee by the indemnitor, either through an express contract or due to vicarious liability of the indemnitee due to the conduct of the indemnitor. *Id.*, 689-90; *see Equitable Life Assurance Society of the U.S. v Werner*, 286 AD2d 632 (1st 2001) ("The key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor.'" [citation omitted]).

Here, Hartford owed no duty to Arch either by contract or by implied or common law indemnification. Indeed, at oral argument on February 24, 2011, Arch admitted as much. The terms of the Individual Defendants' employment agreements with Arch and the wages paid them by Arch were separate agreements, negotiated by them. Hartford was not privy to them and owed no duty under them. Similarly, Arch was not privy to the agreements between the Individual Defendants and Hartford.

At oral argument, however, Arch explained that it brought the indemnification counterclaims to prevent Hartford from arguing that the Individual Defendants suffered no damages due to Hartford's failure to pay compensation under the Old and New Plans since they received these amounts from Arch. This argument is to no avail, because either the Individual Defendants are owed earned compensation under the terms of the Hartford Plans or they are not.

The compensation they received from Arch is irrelevant. Consequently, Arch's counterclaims are dismissed in their entirety.

B. Individual Defendants' Counterclaims

"On a motion to dismiss pursuant to CPLR 3211 (a) (1), the [movant] has the burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the ... claim'" *Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 (1st Dept 2002), quoting *Scadura v Robillard*, 256 AD2d 567, 567 (2d Dept 1998). Moreover, in assessing the adequacy of pleadings on a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must construe the allegations therein liberally, giving the pleading party the benefit of all favorable inferences. *Leon v Martinez*, 84 NY2d 83 (1994). Allegations that consist of bare legal conclusions, and claims that are contradicted by documentary evidence, however, are not entitled to such a presumption. *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-34 (1st Dept 1994).

First & Second Causes of Action

Hartford moves to dismiss the first and second counterclaims. The Individual Defendants' first counterclaim, brought by McElroy, alleges breach of contract, based on Hartford's failure to live up to its commitments to him under the Plans. The second counterclaim, brought by Rafferty and Price, alleges that Hartford breached the implied covenant of good faith and fair dealing in the Plans. They allege no breach of contract claim. The fourth counterclaim alleges that Hartford was unjustly enriched at the Individual Defendants' expense, by the breaches set forth in their first three counterclaims. Hartford moves to dismiss the fourth count to the extent that it relates to the breaches alleged in the first and second counterclaims, but not to the extent it relates to the third counterclaim.

McElroy voluntarily retired from HFP, while Rafferty and Price resigned. Rafferty and Price argue that their resignations were not voluntary. They assert that Hartford wrongfully forced their involuntary resignations, thereby, in effect, terminating them without cause, by offering them an impossible choice under TARP between (a) signing a waiver by which they would agree to slashed compensation; (b) resigning; or (c) being terminated "for cause." According to Rafferty and Price, Hartford, in bad faith, attempted to parlay their contrived resignations into a license to breach its obligations by denying them their entitlements under the Plans. This court finds that the claims of McElroy, who retired, and those of Rafferty and Price, who resigned, must be examined separately.

Rafferty and Price

> In general, and like other contractual entitlements, entitlement to a bonus only exists where the terms of the relevant contract require it. "However, this rule is limited by the 'long standing policy against the forfeiture of earned wages.'" Consistent with this rule (and its limitation), where the employee has already earned compensation under the terms of his employment contract, his termination does not affect his rights to that compensation, but where the employer retains discretion to award a bonus (or other compensation), no forfeiture of earned wages occurs if the bonus is not paid. [citations omitted]

Vetromile v JPI Partners, LLC, 706 F Supp2d 442, 448 (SDNY 2010).

Additionally, "[a]n employee's entitlement to a bonus is governed by the terms of the employer's bonus plan." *Hall v UPS of Amer., Inc.*, 76 NY2d 27, 36 (1990); *accord Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 225 (2000); *Smalley v The Dreyfus Corp.*, 40 AD3d 99 (1st Dept 2007). Where a bonus plan is reasonably susceptible to one interpretation, extrinsic evidence is inadmissible to vary its language. *Namad v Salomon, Inc.*, 74 NY2d 751, 753 (1989).

It is clear that, if Rafferty and Price had resigned under normal circumstances, their

counterclaims would be dismissed. While there is no single document encompassing the terms of the Old Plan or the New Plan, those documents that have been submitted explicitly provide that an employee who voluntarily resigns is not entitled to any post-resignation payments under the Old and New Plans. This is reinforced in letters McElroy wrote to employees, including Rafferty and Price, describing the transition from the Old Plan to the New Plan and stating that you "must remain an active employee of HFP and/or The Hartford organization at large at the time of actual payment to receive any award[s]." *See Truelove*, *supra* (employee not entitled to bonus where plan explicitly predicated payment upon continuation of employment). The PU Plan and the 2005 Stock Plan also note that employees who resign are not entitled to future benefits, in the form of either compensation or stock incentives. All the plans repeatedly refer to Hartford's discretion in awarding the plans' compensation (*see Namad*, *supra*), the payments as contingent on annual performance [*see Johnson v Stanfield Capital Partners, LLC*, 68 AD3d 628, 385 (1st Dept 2009)], and the ability of Hartford to modify or annul the plans (*see Smalley*, *supra*). Rafferty and Price, thus, attempt to distinguish the TARP-related circumstances under which they resigned from a more typical resignation scenario and attempt to re-categorize their departures as constructive terminations.

This court finds, however, that Rafferty's and Price's resignations were, despite the unusual circumstances, voluntary resignations and were not terminations without cause. The terms of the TARP program were set forth by the federal government. As two of the 25 most highly compensated employees at Hartford, they, like the other 23 most highly compensated employees, had the option to agree to the TARP terms, to resign, or to be terminated for cause from Hartford. They chose to resign. Their attempt to re-characterize what happened, by stating that Hartford wrongfully forced their involuntary resignations, is not persuasive.

Rafferty and Price do not allege breach of contract. Instead, they allege breach of the implied covenant of good faith and fair dealing. An implied obligation of good faith and fair dealing "is in aid and furtherance of other terms of the agreement of the parties. No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship." *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 (1983). Hartford acted in compliance with the terms of the Plans in denying Rafferty and Price further compensation or payments thereunder after they resigned. As a result, their claim for breach of implied covenant of good faith and fair dealing, is dismissed.

McElroy

To begin, plaintiffs conceded during oral argument that McElroy, as a retiree, is entitled to payment under the 2005 Stock Plan and the PU Plan. Plaintiffs stated that McElroy has been paid under these plans and will continue to be paid under them. Hence, the only issues before this court on this motion is McElroy's entitlement to payment under the Old and New Plans.

The Plans treat one whose employment with HFP ends by retirement, differently from how they treat an employee who voluntarily resigns or is terminated for cause. However, where the New Plan directly and explicitly explains the rights of a retiree, the Old Plan, in the Powerpoint presented, states that a retire "may" be eligible to payment pursuant thereto, at Hartford's discretion. McElroy's own letters, on the other hand, specifically warn that payments under the plans are discretionary, confined to active employees and may be terminated or amended at any time. Therefore, the Old Plan is ambiguous as to whether McElroy is entitled to payment.

The documentary evidence submitted in regard to the New Plan explicitly states that a retiree vests in the Plan upon retirement. The New Plan speaks to pro-rata payments. Certain benefits

under the Plan, thus, continue after employment ends in the case of a retiring employee. Consequently, this court finds that McElroy's first counterclaim, sounding in breach of contract, survives the instant motion.

Unjust Enrichment

The unjust enrichment cause of action, to the extent it relates to the first and second causes of action, is dismissed as to the Individual Defendants, because the terms of the Plans deal with the same subject matter as the unjust enrichment claim. *See Johnson*, 68 AD3d 629 (party may not recover under quasi-contractual theory where relationship is governed by contract); *Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 (1st Dept 2004) (unjust enrichment claim dismissed where contract covering same subject matter exists between parties).

Request To Replead

Defendants requested that, if the court were to dismiss the counterclaims, they be granted leave to replead, a request opposed by Hartford. Hartford notes that its motion to dismiss is based, in part, on documentary evidence that firmly contradicts the counterclaims and maintains that these documents will not change, such that any repleaded counterclaims again would be deficient.

Presumably Arch will not seek to replead its counterclaims, based on its contentions at oral argument. The Individual Defendants have not submitted their proposed counterclaims. Given that the second counterclaim is dismissed on the basis of documentary evidence, and given that the fourth counterclaim is dismissed to the extent it refers to the first and second counterclaims, this court does not, at this time, foresee repleaded counterclaims that could remedy the shortcomings of the dismissed counterclaims. If, however, the Individual Defendants believe they can overcome the weaknesses in their current counterclaims, they may

move for leave to replead, and submit such proposed repleaded counterclaims to this court, which will then determine their adequacy. While leave to amend or replead is generally freely granted, a court should deny leave when the proposed amendment or repleading "is devoid of merit or palpably insufficient." *Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27 (2d Dept 2008); *Mehlman v Gold*, 183 AD2d 634 (1st Dept 1992). Accordingly, it is

ORDERED that plaintiffs' motion to dismiss the counterclaims of defendants Arch Insurance Group., Inc and Arch Capital Group Ltd is granted; and it is further

ORDERED that plaintiffs' motion to dismiss the first counterclaim of defendants David McElroy, John Rafferty and Michael Price for breach of contract, is denied; and it is further

ORDERED that plaintiffs' motion to dismiss the second counterclaim for breach of the covenant of good faith and fair dealing of defendants David McElroy, John Rafferty and Michael Price is granted; and it is further

ORDERED that plaintiffs' motion to dismiss the fourth counterclaim of unjust enrichment of defendants David McElroy, John Rafferty and Michael Price, is dismissed to the extent said counterclaim relates to their first and second counterclaims; and it is further

ORDERED that plaintiffs are directed to serve a reply to the remaining counterclaims within 20 days after entry of this order upon the efiling system.

Dated: July 12, 2011

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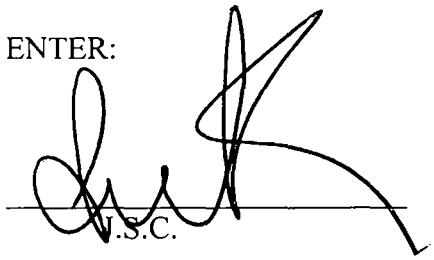

J.S.C.