IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AVIVA LIFE AND ANNUITY COMPANY, and U.S. BANK TRUST NATIONAL ASSOCIATION, as trustee of American Investors Life Insurance Company, Inc. Revocable Trust and as trustee of Indianapolis Life Insurance Company Revocable Trust, Plaintiffs, v. AMERICAN GENERAL LIFE INSURANCE COMPANY, ZC RESOURCE INVESTMENT TRUST, and ZC RESOURCE LLC, Defendants.	*Civil Action No. 8414-VCG*

MEMORANDUM OPINION

Date Submitted: January 30, 2014
Date Decided: April 29, 2014

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GLASSCOCK, Vice Chancellor

It is a commonplace to note that incentives matter, that imposition of taxes begets exceptions to that imposition, and that the existence of exceptions provides an opportunity for tax adepts to benefit from investments that would not be made, absent the positive tax consequences. This matter involves the tax treatment of life insurance benefits as compensation rather than taxable income. The Plaintiffs contracted with the Defendants for an investment vehicle that would exploit such treatment, and the Defendants have attempted, in the Plaintiffs' view, a unilateral amendment to that contractual relationship detrimental to the Plaintiffs. The Plaintiffs allege that such a unilateral amendment is in breach of the agreements among the parties. The Defendants, on the other hand, view their contractual relationship with the Plaintiffs as mandating a component of the challenged amendment as necessary to preserve favorable tax treatment, and allowing the remaining component under the terms of the parties' agreements. The Plaintiffs seek a declaratory judgment vindicating their view. The issue involves, in part, a question of federal law under the Internal Revenue Code that is of first impression. Ultimately, however, because I find that the Plaintiffs will not be directly affected by the amendment unless contingencies, which may never come to pass, in fact arise, and that the opinion sought would be advisory, I decline to so opine, even under the ripeness analysis appropriate under the Declaratory Judgment Act.

I. FACTS[1]

A. *The Policies*

The insurance policies at issue in this action are corporate-owned life insurance policies ("COLIs"). Before discussing the features peculiar to the specific policies at issue here, I will briefly describe these unusual investment vehicles, on the theory that the reader may find the discussion helpful, as did this bench judge at oral argument. COLIs, sometimes derisively referred to as "janitor policies" or "dead-peasant policies," provide benefits upon the death of each of what is typically a large number of company employees. The investment works as follows: A large premium is paid at the time the policy is purchased; that premium is then placed in an investment portfolio by the insurer or a third party. Profits generated by the investment of the premium are used to pay a servicing fee, but otherwise accumulate in the investment portfolio associated with the policy. Upon the death of a covered employee, death benefits are paid to the company, which is both the owner and beneficiary of the policy. The size of the death benefit is determined in part by the amount of profits that have accumulated in the portfolio. Typically, these are long-term investment vehicles, as the benefits are not fully

[1] The facts included herein are predominately gleaned from the pleadings in this matter, as well as the documents incorporated therein. When considering a motion for judgment on the pleadings, this Court may consider "documents incorporated into the complaint and may dismiss the claim if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law." *TravelCenters of Am. LLC v. Brog*, 2008 WL 5272861, at *2 (Del. Ch. Dec. 5, 2008) (internal quotation marks omitted).

paid out for a period of many years, concluding with the death of the last covered employee.

The advantage of such a Byzantine investment structure is that the profits of the investment, paid in the form of death benefits, are free of income or capital gains tax. Therefore, it is of utmost importance to the success of the company's investment that the investment vehicle be treated in such a way that this tax benefit is preserved. If the policies provide for a surrender protocol, the corporate owner of the policy may be able to receive the value of the portfolio containing the premium and accumulated profits upon surrender; such profits, in that case, would be taxable. Such considerations are central to the issues in this case. COLIs, further, are not off-the-shelf products—it is safe to say that most, like the two at issue here, contain terms specifically negotiated by the parties. I now turn to the insurance policies at issue in this litigation.

In October 2000, American Investors Life Insurance Company, Inc. ("American Investors") purchased a COLI from Defendant American General Life Insurance Company ("AGL"), a Texas corporation.[2] American Investors paid an initial premium of $100 million.[3] In June 2001, Indianapolis Life Insurance Company ("IndyLife") also purchased a COLI from AGL, paying an initial

[2] Compl. ¶¶ 16, 20.
[3] *Id.* at ¶ 20.

premium of $50 million.[4] Both the $100 million and $50 million policies (collectively, "the Policies") were purchased through separate Delaware trusts, for which Plaintiff U.S. Bank Trust National Association ("USBT") currently acts as sole trustee.[5]

After the Policies were purchased, American Investors and IndyLife merged into Plaintiff Aviva Life and Annuity Company ("Aviva"), an Iowa corporation that itself provides fixed indexed life insurance and annuity products nationally.[6] Consequently, Aviva is the sole grantor and beneficiary of the Delaware trusts holding each Policy.[7] The Policies are administered by non-party Benefit Finance Partners, LLC ("BFP"), a Delaware limited liability company.[8]

1. <u>Aviva's Investment</u>

The Policies provide Aviva insurance on the lives of designated employees, which payouts "serve as an informal mechanism for partially funding [Aviva's] employee benefit plans."[9] The value of these Policies "is tied to the performance of the investments to which Aviva allocates its cash value."[10] Here, the Policies' cash value—which was established using the $150 million paid in initial

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[4] *Id.*
[5] *Id.* at ¶¶ 3, 20-21.
[6] *Id.* at ¶¶ 14, 21.
[7] *Id.* at ¶ 3.
[8] *Id.* at ¶ 19.
[9] *Id.* at ¶ 2.
[10] *Id.* at ¶ 5.

premiums—was allocated to an investment option offered by AGL.[11] Specifically, this $150 million premium was allocated to an AGL "Separate Account," which is a segregated account comprised of several divisions; each division invests in shares of a corresponding portfolio.[12] Here, Aviva's initial premium payments were directed into the SVP Balanced Division and, correspondingly, invested in the SVP Balanced Portfolio.[13]

The SVP Balanced Portfolio is managed by Defendant ZC Resource Investment Trust ("ZC Trust"), a Delaware trust.[14] Defendant ZC Resource LLC ("ZC Resource," and together with ZC Trust, the "ZC Defendants"), a Delaware limited liability company, previously acted as a trustee of ZC Trust.[15] Aviva describes ZC Trust, ZC Resource, and BFP as affiliates of non-party Zurich Insurance Company Ltd. ("ZIC"); the ZC Defendants clarify, in part, that ZIC "has a number of subsidiaries in the United States, including [Zurich Benefit Finance, LLC, the current trustee of ZC Trust], which owns an interest in BFP."[16]

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[11] *Id.* at ¶¶ 23-24 (noting that this cash value is used to pay the cost of insurance).
[12] *See, e.g.*, Compl. Ex. A.2 at 10, 16; *see also* ZC Defs.' Op. Br. at 5.
[13] *See, e.g.*, Compl. ¶¶ 24-25; ZC Defs.' Op. Br. at 6.
[14] Compl. ¶¶ 17, 24; *see also* Compl. Ex. A.3 at 1.
[15] Compl. ¶ 18. The ZC Defendants note that ZC Resource is no longer a trustee of ZC Trust. ZC Defs.' Answer ¶ 18. Because I grant the Defendants' Motion for Judgment on the Pleadings, there is no need, at this point in time, for the Plaintiffs to add the current trustee of ZC Trust as a party to their Verified Complaint.
[16] Compl. ¶ 19; ZC Defs.' Answer ¶ 19; *see also* ZC Defs' Op. Br. at 1 n.2.

After Aviva allocated its $150 million cash value to the SVP Balanced Portfolio, two SVP Balanced Sub-Portfolios were established.[17] Each SVP Balanced Sub-Portfolio has two components: a securities portfolio and an "SVP Product."[18] The securities portfolio invests in stocks and bonds.[19] Conversely, the SVP Product, a stable value protection component provided by ZIC, is designed "to address fluctuations in the value of the [s]ecurities [p]ortfolio."[20] Accordingly, the book value of each SVP Balanced Sub-Portfolio equals the sum of the values of its securities portfolio and SVP Product, while the value of the SVP Product equals the difference between the book and market values of that Sub-Portfolio.[21] The book value of each Sub-Portfolio, in turn, is set by reference to a crediting rate (i.e. interest rate) set out in the agreements among the parties.[22]

According to Aviva, "[u]nder the original investment terms, the value of the [SVP Balanced Sub-Portfolio] was to grow at a fixed crediting rate to be reset annually pursuant to a formula that would reflect market conditions and amortize . . . the value of the [SVP Product] over time."[23] The SVP Balanced Sub-Portfolios

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[17] *See, e.g.*, Compl. Ex. A.3 at 46; ZC Defs.' Op. Br. at 6.
[18] Compl. ¶ 25; Compl. Ex. A.3 at 35. The securities portfolio is also referred to in the record as the "Corresponding Portfolio" or the "SVP Balanced Portfolio."
[19] Compl. Ex. A.3 at 35; *see also* ZC Defs.' Op. Br. at 6; Aviva's Reply Br. at 6.
[20] Compl. ¶ 26; Compl. Ex. A.3 at 24-25, 35; *see also* Compl. Ex. A.2 at 16.
[21] *See, e.g.*, Compl. ¶ 27; Compl. Ex. A.3 at 23; ZC Defs.' Op. Br. at 7.
[22] *See, e.g.*, Compl. Ex. A.3 at 24-25.
[23] Compl. ¶ 27.

initially had a minimum crediting rate of 0%.[24] As described below, when the Policies were amended in the early 2000s, the minimum crediting rate was increased to 8%.

The parties dispute the purpose of the SVP Product, as well as its impact on Aviva's investment. According to Aviva, the purpose of the SVP Product is to ensure a guaranteed annual return; initially, of 0%—in other words, a guaranteed non-negative return—and later, of 8%. Aviva, in fact, describes the SVP Product as "a guaranty of minimum cash value promised by non-party [ZIC]."[25] To emphasize this understanding, it describes this stable value protection component as an "investment component," and refers to this product as the "ZIC Guaranty Product," despite its given name in the transaction documents: the "SVP Product."

Under Aviva's view, the value of the SVP Product, if any, would accrue to Aviva if (and only if) it chooses to abandon the Policies as a tax-free investment vehicle.[26] In other words, upon surrender, AGL would be required to pay Aviva the book value of the SVP Balanced Sub-Portfolios, profit from which would be subject to tax. This payout would necessarily include the value of the SVP Product, if the SVP Product retained any value; that is, if at the time AGL

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[24] *Id.* At Oral Argument, counsel for Aviva asserted that the Policies originally "had a minimum crediting rate of zero or the Lehman Brothers [B]ond [I]ndex, whichever was higher." Oral Arg. 78:11-13.
[25] Aviva's Op. Br. at 3.
[26] In Aviva's view, the SVP Product may have some value if the premium is reallocated through a procedure that is not at issue here.

transferred the value of the Sub-Portfolios to Aviva, the Sub-Portfolios' market value was below their book value. The contracted-for timing of that payment, post-surrender, is a matter of contract and is hotly debated by the parties, as is the crediting rate that would apply after surrender.

The Defendants, conversely, emphasize that the SVP Product "is designed and intended to smooth the volatility or market fluctuations in the net asset value of the [securities portfolio], *providing accounting benefits only* and not an economic return."[27] They refer to a section of the Restated Investment PPMs (defined below), which provides:

> [T]he SVP Product will moderate fluctuations in the [net asset value] of the [securities portfolio]. The crediting rates are set by ZIC so that over the long-term, each SVP Sub-Portfolio can be expected to produce a total return equal to that of the [securities portfolio] less the SVP Product Fees.[28]

The Defendants argue that "[c]onsistent with this purpose . . . the total return of the SVP Balanced Sub-Portfolio . . . is expected to converge over the long term to equal the total return of the [securities portfolio] . . . less the SVP Product fees. In other words, the SVP Product is expected to amortize to zero."[29]

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[27] ZC Defs.' Op. Br. at 6 (emphasis added); *see also id.* at 9 (taking the position that "the minimum crediting rate resulted in accounting benefits to Aviva but did not increase the risk or economic exposure to the ZC Defendants and the SVP Product provider").
[28] Compl. Ex. A.3 at 24-25.
[29] ZC Defs.' Reply Br. at 7 (citation omitted).

The Defendants, further, emphasize that, although "the surrender proceeds may or may not include an amount attributed to the SVP Product as a component," "there is nothing in the transaction documents requiring AGL to pay the surrender proceeds when the SVP Product value is positive," and that "payment of surrender proceeds when the SVP Product has been amortized to zero is wholly consistent with the expectations of the parties expressed in the transaction documents."[30]

2. The Transaction Documents

The Policies are governed by an array of "substantially similar" documents (collectively, the "Transaction Documents").[31] In addition to the documents creating the Policies, the Policies were accompanied by private placement memoranda (the "Policy PPMs"). Aviva was also provided a private placement memorandum for each Policy from ZC Trust, describing the terms and features of Aviva's investment (the "Investment PPMs"). Additionally, at the time the Policies were purchased, Aviva and USBT entered into commitment letters with AGL (the "AGL Commitment Letters"), while AGL entered into commitment letters with ZC Trust (the "ZC Trust Commitment Letters," and together with the AGL Commitment Letters, the "Commitment Letters").

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[30] *Id.* at 2.
[31] Compl. at ¶¶ 20, 30.

The Commitment Letters contain language limiting the Defendants' ability to amend the Transaction Documents.[32] The expressed intent of these provisions is to prevent AGL or ZC Trust from "mak[ing] or agree[ing] to any changes in any Transaction Documents that would prevent [Aviva] from realizing in all material respects the benefits of the transactions reflected in the Controlling Documents" or Trust Controlling Documents, respectively.[33]

Specifically, in Section 13 of the AGL Commitment Letters, AGL covenanted that it would "enforce for the benefit of [Aviva] all of [Aviva's] respective rights under all of the [Transaction Documents]."[34] Further, Section 13 provides that AGL "will not modify, amend or change any of the Transaction Documents in any way which could change in any material respect the rights of [Aviva] and/or the terms and conditions of the transactions reflected in the Controlling Documents."[35] Similarly, Section 7 of the ZC Trust Commitment Letters provides that ZC Trust "will not modify, amend or change any of the Transaction Documents in any way which could change in any material respect the rights of [Aviva] and/or the terms and conditions of the transactions reflected in the

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[32] The Commitment Letters define "Transaction Documents" differently than this Memorandum Opinion; however, those distinctions do not impact my analysis. *See, e.g.*, ZC Defs.' Reply Br. at 17 n.13 (noting that the term "Transaction Documents" is "defined broadly in the AGL Commitment Letter[s] to include virtually all documents associated with the Policies").
[33] Compl. Ex. A.4 at § 13; Compl. Ex. A.5 at § 7.
[34] Compl. Ex. A.4 at § 13.
[35] *Id.* The "Controlling Documents" include the Policies and accompanying Certificates, the Policy and Investment PPMs, the Hold Harmless Agreement, and the AGL Commitment Letter. *Id.* at 1.

Trust Controlling Documents."[36] Although Aviva is not a party to the ZC Trust Commitment Letters, it emphasizes that "AGL covenanted to Aviva that AGL would enforce this ZC Trust commitment for the benefit of Aviva."[37]

3. The 2001 Amendments

In December 2001 and January 2002, Aviva provided AGL with notice of its intent to surrender the Policies.[38] The Policies were subsequently renegotiated and amended (collectively, the "2001 Amendments"), and Aviva withdrew its notice of surrender.[39] As a result of the 2001 Amendments, the Policy PPMs were amended (the "Restated Policy PPMs"), as were the Investment PPMs (the "Restated Investment PPMs").[40]

In particular, the 2001 Amendments changed the minimum crediting rate of the SVP Balanced Sub-Portfolios from 0% to 8% and implemented a maximum crediting rate of 10%.[41] During negotiations, ZIC agreed to contribute $15.6 million to the securities portfolio, while Aviva made an additional premium payment—that is, an additional investment—of $30 million.[42] Additionally, the 2001 Amendments altered the Policies' surrender protocol. Specifically, the parties agreed to a "Special Surrender Protocol." Whereas, prior to this

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[36] Compl. Ex. A.5 at § 7.
[37] Compl. ¶ 9.
[38] *Id.* at ¶¶ 29, 31.
[39] *Id.* at ¶¶ 29, 32-33.
[40] *Id.* at ¶ 34.
[41] *Id.* at ¶ 32; *see also* Compl. Ex. A.3 at 25.
[42] Compl. ¶¶ 32-33.

amendment, AGL could defer payment for a maximum of six months, under the new Special Surrender Protocol, AGL acquired the "sole discretion" to determine the timing of payment after receiving Aviva's notice of intent to surrender.[43] Following a surrender notice, moreover, the minimum crediting rate was to be reduced annually, though this rate was not to fall below the Barclays Capital Aggregate Bond Index.[44]

4. Relevant Treasury Regulations

As variable life insurance policies, the Policies are entitled to significant tax advantages. To receive these benefits, however, each Policy must qualify as a "life insurance contract" under Section 7702 of the Internal Revenue Code.[45] To maintain this status, the Policies must remain compliant with the diversification rules espoused in Internal Revenue Code § 817(h) and § 1.817-5 of the Treasury Regulations.[46] If either Policy were to become non-compliant, its favorable tax status would be lost.[47] Pursuant to a Hold Harmless and Indemnity Agreement

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[43] *See, e.g.*, *id.* at ¶ 35; Compl. Ex. A.1 at 16-17; Compl. Ex. A.2 at 20-21.
[44] Compl. ¶ 35; Compl. Ex. A.3 at 29-30.
[45] *See, e.g.*, Compl. Ex. A.2 at 36-37; Compl. Ex. A.4 at § 4; ZC Defs.' Op. Br. at 10; *see also* 26 U.S.C § 7702.
[46] *See, e.g.*, Compl. ¶ 58; Compl. Ex. A.2 at 36-38; Compl. Ex. A.3 at 43-44; Compl. Ex. A.4 at §§ 4-5; Compl. Ex. A.5 at § 4; ZC Defs.' Op. Br. at 10-11; *see also* 26 U.S.C. § 817; 26 C.F.R. § 1.817-5.
[47] *See, e.g.*, Compl. ¶ 58.

entered into by AGL and Aviva (the "Hold Harmless Agreement"), Aviva would not bear the tax burden of such a loss.[48]

Under the IRC's diversification rules, to maintain "life insurance contract" status, the investments of a segregated asset account—here, the investments of the SVP Balanced Sub-Portfolios—must remain adequately diversified. Under § 1.817-5(b)(1), the investments of a segregated asset account are sufficiently diversified if "[n]o more than 55% of the value of the total assets of the account is represented by any one investment . . . ."[49] In § 1.817-5(d), the IRS outlined a market fluctuations safe harbor, which provides:

> A segregated asset account that satisfies the requirements of paragraph (b) of this section [which outlines ways to sufficiently diversify the investments of a segregated asset account] at the end of any calendar quarter (or within 30 days after the end of such calendar quarter) shall not be considered nondiversified in a subsequent quarter because of a discrepancy between the value of its assets and the diversification requirements unless such discrepancy exists immediately after the acquisition of any asset and such discrepancy is wholly or partly the result of such acquisition.[50]

As explained below, Aviva contends that this rule applies to fluctuations in the value of the SVP Product.

The Transaction Documents contain several provisions highlighting the importance of retaining these tax benefits, and permitting the Defendants to make

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[48] *See* ZC Defs.' Reply Br. Ex. C.
[49] 26 C.F.R. § 1.817-5(b)(1)(A); *see also* 26 U.S.C. § 817(h).
[50] 26 C.F.R. § 1.817-5(d).

unilateral changes to the Policies in order to ensure compliance. In fact, Section 5 of the AGL Commitment Letters recognizes that the Policies "may need to be modified to remain in compliance" with Treasury Regulations § 1.817-5, and provides that AGL "reserves the right to modify the [Policies], as necessary, to comply with the regulations . . . ."[51] Similarly, Section 4 of the ZC Trust Commitment Letters provides that, "[t]o comply with Treasury Regulations Section 1.817-5, the Trust . . . is *required* to diversify the investments in each Separate Account Division."[52] Further, the Restated Investment PPMs provide that "[c]ompliance with the Diversification Rules . . . is of fundamental importance" and "may have the effect of reducing the return of the Trust, however, as the investment and strategies utilized by [the investment advisor] may be limited by the necessity to comply with those Rules."[53]

The Defendants explain that, in the fall of 2011, due to the widening gap between the 8% minimum crediting rate and the lower-yield performance of the securities portfolio, "the value of Aviva's SVP Product neared 55% of the value of the assets of the SVP Balanced Division, consisting of the securities and SVP Product held by the SVP Balanced Sub-Portfolios."[54] In fact, the Defendants aver that they were prompted to address this potential diversification issue after Aviva

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[51] Compl. Ex. A.4 at § 5.
[52] Compl. Ex. A.5 at § 4 (emphasis added).
[53] Compl. Ex. A.3 at 44-45.
[54] ZC Defs.' Op. Br. at 12.

raised "significant concerns regarding compliance with the diversification requirements."[55] To rectify the situation, and as described more fully below, the Defendants instituted a "55% Cap" on the value of the SVP Product.[56] In other words, the Defendants have announced a cap on the growth of the SVP Product to ensure that it remains no more than 55% of the value of the Sub-Portfolios in question. This announcement, which Aviva argues would constitute a breach of contract, is theoretical, as the SVP Product has not, and may never, reach the 55% mark; thus, the Cap may never be triggered.

Nevertheless, Aviva avers that, under its reading of the Treasury Regulations, this cap is unnecessary. Aviva argues that "[t]he 55% Rule does not apply where, as here, the life insurance investment accounts initially satisfied the tax code's diversification requirements, but market fluctuations subsequently cause the value of one investment to exceed 55% of the total assets of the portfolio."[57] Aviva further explains that the market fluctuations rule in § 1.817-5(d) is applicable, as "the supposed non[-]diversification risk does not come from any acquisition" but instead "from the [SVP Product]—an asset that Aviva has held

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[55] AGL's Answer & Affirmative Defenses at 26-27; *see also* ZC Defs.' Answer & Affirmative Defenses at 40, 43.

[56] The Defendants contend that "implementation of the 55% Cap does not prevent Aviva from receiving any material benefits reflected in the Controlling Documents, but, instead, effectively preserves these benefits." ZC Defs.' Op. Br. at 28.

[57] Compl. ¶ 59.

since the inception of the Policies and whose value has changed solely as a direct result of market performance."[58]

Despite the purported clairvoyance with which Aviva interprets the Treasury Regulations, the Defendants dispute Aviva's application of the market fluctuations rule here. The parties agree, however, that the IRS has not yet addressed the applicability of the safe harbor provision in a situation analogous to the one currently before me.

B. *The Challenged 2011 Supplements*

In December 2011, BFP delivered to Aviva draft "supplements" to the Restated Policy PPMs and Restated Investment PPMs.[59] Generally, these supplements (the "2011 Supplements") address two issues pertinent here; first, they adopt the 55% Cap on the SVP Product described above, ostensibly to comply with Treasury Regulations. Second, they purport to amend the Special Surrender Protocol to make explicit how AGL would choose to exercise its "sole discretion" in determining the timing of payment upon a surrender of the Policies.

On December 14, 2011, BFP reviewed drafts of the supplements with Aviva.[60] Thereafter, according to the Plaintiffs, "BFP sent Aviva and [USBT] copies of the 2011 Supplements with the 'draft' label deleted along with

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[58] Aviva's Op. Br. at 19 (emphasis omitted).
[59] Compl. ¶ 39.
[60] *Id.* at ¶ 43.

'Acknowledgements of Receipt,' and requested that Aviva and [USBT] execute the Acknowledgements of Receipt."[61] On January 9, 2012, Aviva notified BFP that it would not consent to the 2011 Supplements, and that it had advised USBT not to sign the Acknowledgements of Receipt. [62]

During a January 11, 2012 teleconference, "BFP advised Aviva that the Defendants deemed the 2011 Supplements to be in full force and effect without Aviva's consent."[63] Aviva objected, and on March 2, sent AGL a letter reiterating its objection.[64] AGL did not respond; Aviva waited almost two months before following up, sending a letter to AGL on April 30, asserting that "it would not accept the 2011 Supplements and reject[ing] BFP's assertion that the Defendants could legally implement the 2011 Supplements."[65] AGL responded on May 3, communicating "that it did not intend to withdraw the 2011 Supplements," which went into effect December 31, 2011.[66] Although AGL and Aviva subsequently engaged in discussions about these amendments, they were unable to resolve their dispute.[67]

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[61] Aviva's Op. Br. at 10-11; *see also* Compl. ¶ 43.
[62] Compl. ¶ 44.
[63] *Id.* at ¶ 45.
[64] *Id.* at ¶¶ 45-46.
[65] *Id.* at ¶ 47.
[66] *Id.* at ¶ 48. In this letter, AGL explained that it had instituted a cap on the SVP Product to comply with IRS diversification rules. *Id.* at ¶ 58.
[67] *Id.* at ¶ 48. Aviva noted that, "[n]otwithstanding Aviva's repeated requests, ZC Trust and ZIC have refused to meet or even discuss the 2011 Supplements with Aviva." *Id.* In their Answer,

1. The Revised Special Surrender Protocol

The challenged supplements change the Special Surrender Protocol in two ways (the "Revised Special Surrender Protocol"). Whereas, following the 2001 Amendments, AGL had the "sole discretion" to determine the timing of payment following a surrender of the Policies, the Revised Special Surrender Protocol provides that "[w]hen the SVP Product value . . . equals zero or less . . . the SVP Sub-Portfolio will liquidate its interest in the [securities portfolio] and pay the proceeds thereof to [AGL]."[68] In other words, the SVP Balanced Sub-Portfolios will liquidate only when the book value of that Sub-Portfolio is less than or equal to its market value and the SVP Product has amortized to a null value.

Additionally, the Revised Special Surrender Protocol changes the crediting rate floor, post-surrender, from the Barclays Capital Aggregate Bond Index to the federal funds rate.[69] In effect, "the guaranteed minimum crediting rate would be reduced over time following a surrender notice from 8% to a floor equal to [the] federal funds rate," instead of the Barclays Capital Aggregate Bond Index.[70] So long as the federal funds rate is below the Barclays Index, the result of this

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the ZC Defendants "den[ied] that Aviva has made 'repeated requests' to meet with them." ZC Defs.' Answer ¶ 48.

[68] Compl. Ex. B.2 at 2.

[69] *See id.* at 2-3.

[70] Compl. ¶ 40; *see also* Compl. Ex. B.2 at 2-3.

amendment would be to accelerate the amortization of the SVP Product, post-surrender.

2. The 55% Cap

The 2011 Supplements also establish a cap so that the value of the SVP Product does not exceed 55% of the aggregate value of the SVP Balanced Sub-Portfolio.[71] If this Cap is reached, the SVP Product value and, correspondingly, the value of the SVP Balanced Sub-Portfolio, will be adjusted automatically.[72]

3. The Parties' Dispute

It is these 2011 Supplements, implemented by the Defendants without Aviva's consent, that Aviva challenges here. Aviva argues that these unilateral amendments "have the effect of materially modifying Aviva's rights as well as the terms and conditions of the transactions reflected in the Transaction Documents."[73] The Defendants counter that the 2011 Supplements "were permissible without Aviva's consent or approval under the terms of the parties' agreements,"[74] highlighting the importance of retaining the Policies' compliance with the diversification rules, as emphasized in the Transaction Documents, and AGL's "sole discretion" to determine the timing of payments upon surrender.[75] The

[71] Compl. ¶41; *see also* Compl. Ex. B.2 at 2.
[72] Compl. Ex. B.2 at 2.
[73] Compl. ¶ 67.
[74] ZC Defs.' Answer ¶ 45.
[75] *See, e.g.*, ZC Defs.' Op. Br. at 12 ("At bottom, as the Transaction Documents confirm, compliance with the Diversification Rules was integral to the transaction even if ensuring

question before me, to the extent that one has been presented, is whether the unilateral imposition of these amendments constituted a breach of the Transaction Documents, as well as the implied covenant of good faith and fair dealing.

II. PROCEDURAL HISTORY

On March 18, 2013, Aviva and USBT filed a Verified Complaint alleging four Counts against AGL and the ZC Defendants. In Count I, the Plaintiffs seek a declaration that

> (i) the Defendants' unilateral imposition of the 55% Cap is an invalid exercise of their rights under the Transaction Documents, (ii) the Defendants' unilateral imposition of a modified Special Surrender Protocol is an invalid exercise of their rights under the Transaction Documents, and (iii) the Defendants' unjustified imposition of the 2011 Supplements would constitute tortious interference with the Policies.[76]

They also seek to enjoin AGL and non-party ZIC from engaging in conduct inconsistent with that declaration.[77] In Count II, the Plaintiffs allege that AGL breached the AGL Commitment Letter by "acting together with, or allowing, ZC Trust to implement unilaterally the 2011 Supplements," a breach for which the Plaintiffs seek specific performance, or alternatively, monetary damages.[78] In Count III, the Plaintiffs allege that the ZC Defendants' imposition of the 2011

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compliance with those rules resulted in a reduction in the economic benefits of the investment. This is important because . . . the 55% Cap was necessary to meet the contractual requirement of compliance with the Diversification Rules, and thereby to ensure that the Policies continued to qualify as life insurance.").

[76] Compl. ¶ 70.

[77] *Id.*

[78] *Id.* at ¶¶ 75, 77-78.

Supplements amounts to tortious interference with the contractual relationship among the Plaintiffs and AGL.[79] In Count IV, the Plaintiffs allege that AGL breached the implied covenant of good faith and fair dealing.[80] The Plaintiffs seek injunctive and monetary relief in connection with Counts III and IV.[81]

On August 9, 2013, the ZC Defendants moved for judgment on the pleadings, while AGL moved for judgment on the pleadings on August 13. On October 4, 2013, Aviva moved for judgment on the pleadings. The parties briefed these Cross-Motions, with AGL joining and substantially adopting the arguments made by the ZC Defendants, and USBT relying on the arguments of its co-Plaintiff.[82] I heard oral argument on January 30, 2014.

III. STANDARD OF REVIEW

A motion for a judgment on the pleadings pursuant to Court of Chancery Rule 12(c) "will be granted if no material issue of fact exists and the moving party is entitled to judgment as a matter of law."[83] In considering cross-motions for judgment on the pleadings, I "must accept as true all of the non-moving party's well-pleaded factual allegations and draw all reasonable inferences in favor of the

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[79] *Id.* at ¶¶ 79-84.
[80] *Id.* at ¶¶ 85-91.
[81] *Id.* at ¶¶ 84, 91.
[82] Although USBT never filed a Motion for Judgment on the Pleadings, it has joined in Aviva's argument. Consequently, my decision herein is binding on both Plaintiffs.
[83] *Fiat N. Am. LLC v. UAW Retiree Med. Benefits Trust*, 2013 WL 3963684, at *7 (Del. Ch. July 30, 2013).

non-moving party."[84] I may also "consider the unambiguous terms of exhibits attached to the pleadings and those incorporated into them by reference."[85]

In order to withstand a motion for judgment on the pleadings, the dispute must be ripe for judicial decision. Under Delaware law, "[a] ripe dispute arises where litigation sooner or later appears to be unavoidable and where the material facts are static. In deciding whether a claim is ripe for decision, Delaware courts look at whether the interests of those who seek relief outweigh the interests of the court and of justice in postponing review until the question arises in some more concrete and final form."[86]

IV. ANALYSIS

Aviva[87] argues that the 2011 Supplements "harm [its] economic interests by eliminating [its] right to receive the value of the [SVP] Product."[88] Aviva avers, in particular, that the Revised Special Surrender Protocol "depriv[es] Aviva of its ability to obtain the value of [the SVP Product] . . . *should* Aviva opt to surrender the Policies."[89] Aviva highlights, in part, the substitution of the federal funds rate

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[84] *OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006).

[85] *Credit Suisse Sec. (USA) LLC v. W. Coast Opportunity Fund, LLC*, 2009 WL 2356881, at *3 (Del. Ch. July 30, 2009).

[86] *Julian v. Julian*, 2009 WL 2937121, at *3 (Del. Ch. Sept. 9, 2009) (footnote and internal quotation marks omitted).

[87] Although USBT has joined in Aviva's arguments, I refer to only Aviva in my analysis.

[88] Compl. ¶ 52

[89] Aviva's Op. Br. at 1 (emphasis added); *see also id.* at 10 (arguing that, "under the Revised [Special] Surrender Protocol, Aviva will *never* obtain any value from the [SVP Product]") (emphasis in original).

for the Barclays Capital Aggregate Bond Index, noting that the former has been historically much lower; thus, Aviva avers it is no longer entitled to "a guaranteed return equal to the Barclays Capital Aggregate Bond Index."[90] It further contends that this revised mechanism, which provides that, upon surrender, AGL will receive the proceeds of the Sub-Portfolio only when the SVP Product has been amortized to zero, "has the draconian effect of delaying *any* payment indefinitely . . . until the book value of the Policies reaches their market value (which may never happen)."[91]

In addition, Aviva argues that, if the 55% Cap were reached, "ZIC would [] be applying an effective crediting rate that did not follow the crediting rate formula mandated by the Restated Investment PPM;" thus, according to Aviva, the 55% Cap has the effect of eliminating the 8% minimum crediting rate applied to the SVP Balanced Sub-Portfolios.[92] Although the Defendants maintain this 55% Cap was implemented to ensure compliance with the IRS diversification rules, Aviva contends that the IRS diversification rules do not require the Cap, and alternatively, if compliance were necessary, other options more favorable to Aviva should have been implemented instead.[93]

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[90] *Id.* at 27.
[91] Aviva's Reply Br. at 13 (emphasis in original).
[92] Aviva's Op. Br. at 17.
[93] *See, e.g.*, *id.* at 2. Aviva also makes the argument—for the first time in its Reply Brief—that "[t]he Transaction Documents do not give the Defendants the right to amend the terms of the deal based on speculation regarding positions the IRS might take on tax matters. Rather, they

A. *Request for a Declaratory Judgment*

Aviva requests that this Court render a judgment declaring that the Defendants' implementation of the Revised Special Surrender Protocol and 55% Cap are "invalid exercise[s] of their rights under the Transaction Documents," as they "have the effect of materially modifying Aviva's rights as well as the terms and conditions of the transactions reflected in the Transaction Documents."[94] In particular, Aviva highlights provisions within the Commitment Letters stating that the Defendants "will not modify, amend or change any of the Transaction Documents in any way which could change in any material respect the rights of [Aviva] and/or the terms and conditions of the transactions . . . ."[95] Aviva also argues generally that, because the Defendants did not reserve any right to amend the Special Surrender Protocol negotiated as a part of the 2001 Amendments, their unilateral implementation of the Revised Special Surrender Protocol "is a fundamental breach of the Transaction Documents."[96]

Aviva, however, requests declaratory relief despite the fact that the 55% Cap has never been reached, and may never be reached, and although Aviva has neither provided AGL with notice of its intent to surrender nor demonstrated—or even

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provide a specific mechanism *under the Hold Harmless Agreement* allowing AGL to make changes for tax reasons, but that provision's requirements are not met here." Aviva's Reply Br. at 18 (emphasis added).

[94] Compl. ¶¶ 67, 70.

[95] Compl. Ex. A.4 at § 13; Compl. Ex. A.5 at § 7.

[96] Aviva. Op. Br. at 28.

pleaded—any intent to surrender these Policies. Instead, Aviva requests that I determine the effect of these mechanisms lest either transpires. Accordingly, the Defendants aver that Aviva's request is not ripe for judicial determination.[97] Under the specific facts here, I agree, as explained in detail below.

Under the Declaratory Judgment Act, this Court has the "power to declare rights, status and other legal relations whether or not further relief is or could be claimed."[98] For this Court to grant declaratory relief, "[a] litigant need not have suffered actual harm, but an actual controversy must exist so that judicial resources are not wasted on hypothetical disputes or on situations in which a judicial declaration will not end the dispute between the parties."[99] Although this Act "enables the courts to advance the stage at which a matter traditionally would have been justiciable,"[100] our Supreme Court "has emphasized that the declaratory

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[97] *See Julian v. Julian*, 2009 WL 2937121, at *3 (Del. Ch. Sept. 9, 2009) ("Ripeness, the simple question of whether a suit has been brought at the correct time, goes to the very heart of whether a court has subject matter jurisdiction.") (internal quotation marks omitted).

[98] 10 *Del. C.* § 6501.

[99] *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 A.2d 1133, 1137 (Del. Super. 1992); *see also Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 686 (Del. Super. 1989) ("The first Declaratory Judgment Act was enacted in this state in 1935. Its purpose was remedial-to accelerate the time at which suit could be brought and a judgment received, in order that a litigant need not await actual harm to him before his cause of action ripened. At the same time, some restraint on the Court's jurisdiction over inchoate claims was needed. Without such a restriction judicial resources would be wasted on hypothetical or moot cases, or on situations where a judicial declaration would not end the controversy between the parties. In addition, . . . [p]roducing judicial declarations not related to an actual controversy would disrupt [the] orderly development of law.") (citations and footnote omitted).

[100] *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *6 (Del. Ch. Oct. 11, 2006).

judgment statute must not be used as a means to elicit advisory opinions from the courts."[101]

To present an actual controversy, the disputed issue must be, among other things, ripe for adjudication.[102] "The ripeness doctrine reflects two goals: first, to conserve judicial resources by not allocating them to resolution of disputes that are not ready for judicial disposition, and, second, to avoid the development of the law in the absence of concrete facts and adversary positions upon which case law is premised."[103] In deciding whether the matter before me is ripe for judicial determination, I must "engage in a practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented and the hardship that further delay may threaten [as well as] the prospect of future factual development that might affect the determination to be made."[104] Having reviewed the record

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[101] *Id.* at *7 (citing *Ackerman v. Stemerman,* 201 A.2d 173 (Del. 1964); *Stroud v. Milliken Enters., Inc.,* 552 A.2d 476 (Del. 1989)); *see also Stroud*, 552 A.2d at 480 ("Courts decline to render hypothetical opinions . . . for two basic reasons. First, judicial resources are limited and must not be squandered on disagreements that have no significant current impact and may never ripen into legal action [appropriate for judicial resolution]. Second, to the extent that the judicial branch contributes to law creation in our legal system, it legitimately does so interstitially and because it is required to do so by reason of specific facts that necessitate a judicial judgment. Whenever a court examines a matter where facts are not fully developed, it runs the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law.") (citation and internal quotation marks omitted).

[102] *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2014 WL 605753, at *2 (Del. Super. Jan. 21, 2014).

[103] *Tenneco Auto. Inc. v. El Paso Corp.*, 2001 WL 1641744, at *6 (Del. Ch. Nov. 29, 2001).

[104] *TVI Corp. v. Gallagher*, 2013 WL 5809271, at *18 (Del. Ch. Oct. 28, 2013) (internal quotation marks omitted); *see also Playtex Family Products, Inc.*, 564 A.2d at 687 ("In deciding whether an issue is ripe for adjudication, I must balance between the competing judicial interests mentioned: the first, embodied in the Declaratory Judgment Act, calling for an early resolution of

before me, and for the following reasons, I find that Aviva's request for a declaratory judgment is not yet ripe for judicial determination.

1. The 55% Cap

The 55% Cap has not yet and may never be triggered; Aviva merely speculates it will be triggered in the future. A declaration on this provision's validity, moreover, demands my application, on an advisory basis, of Treasury Regulations to a situation not yet addressed by the IRS. Nevertheless, Aviva, having decided not to request a private letter ruling from the IRS that would dispose of this aspect of the parties' dispute, implores me to find that the market fluctuations rule in 26 C.F.R. § 1-817.5(d) applies here. Aviva, forgoing the option of seeking a private letter ruling that would have been binding on the parties before me, instead brings this issue of first impression to the Court of Chancery. However, even if I were to address and decide this issue, my decision would not be binding on the IRS or the federal courts.

Further, if I adopt Aviva's position but am nevertheless wrong, the Policies may lose their favorable tax status. Aviva, however, is immunized from the consequences of such a loss pursuant to the Hold Harmless Agreement between AGL and Aviva. Thus, it is the Defendants—the parties advocating against

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controversy; and second, those of judicial economy and legal stability which augur for restraint. It is because this Court is required to weigh these interests based on the facts of each case which comes before it that the availability of a declaratory remedy necessarily involves the exercise of judicial discretion.").

Aviva's position, and that the matter is not ripe for adjudication—that would ultimately be harmed by a premature and improvident decision here.[105] In other words, the risk of an improvident advisory opinion would fall solely on the Defendants.

I thus decline to wade into murky IRS waters to determine the necessity, the reasonableness, or the validity of the 55% Cap, which has never, and may never, be triggered, aware that such a ruling, if not ultimately followed by the IRS, could cause the Policies to lose their favorable tax status, an event that would inflict significant harm on the Defendants and leave Aviva virtually unscathed. Aviva, moreover, is not unduly burdened by a determination that this request for declaratory relief is unripe, as Aviva may request a private letter ruling from the IRS clarifying whether this Cap is necessary.[106] Further, the detriment imposed by my declining to address the issue does not unduly prejudice Aviva. Until surrender, the Cap is an accounting device, and the value of the SVP Product, if any, may be recalculated upon surrender and court review under concrete circumstances; thus, Aviva suffers only the uncertainty inherent in the contract for

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[105] At Oral Argument, counsel for the ZC Defendants informed the Court that, although AGL is required to hold Aviva harmless, the ZC Defendants, pursuant to an agreement with AGL, bear the ultimate liability if the Policies were to lose their status as "life insurance contracts" under federal tax law. Oral Arg. Tr. at 126:20-127:5.

[106] *See Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 690 (Del. Super. 1989) (finding that "the harm to the plaintiffs of dismissing [the pending] action, which is to be weighed in a ripeness analysis, [was] not overwhelming").

which it bargained, and—if its interpretation of that contract is correct—can be made whole should a surrender ever come to pass.

For the reasons above, I decline to address the validity of the 55% Cap.

2. Revised Special Surrender Protocol

The Defendants have also unilaterally revised the Special Surrender Protocol, purportedly clarifying how AGL would exercise its "sole discretion" to determine the timing of payout in the event that Aviva surrendered either or both of its Policies.[107] Aviva asserts that this unilateral amendment violates the Transaction Documents, as well as the implied covenant of good faith and fair dealing, and that this dispute is ripe for a judgment pursuant to the Declaratory Judgment Act. Despite Aviva's various contentions as to why this dispute is ripe,[108] there is no present justiciable controversy as to the validity of the Revised Special Surrender Protocol.

Aviva has not indicated that it is considering whether to surrender the Policies, and has not expressed that my decision here, even if favorable to Aviva, would be dispositive in its decision-making in that regard. It points out, however, that a judicial explanation of how this mechanism would operate, and whether this operation violates the Transaction Documents, would be useful in evaluating

[107] Consequently, the Defendants contend that the terms of the Revised Special Surrender Protocol do not materially change the Policies. *See, e.g.*, ZC Defs.' Op. Br. at 3-4.
[108] *See* Aviva's Op. Br. at 32-35.

Aviva's ongoing choice of whether to maintain or surrender these Policies. In effect, Aviva argues that upon weighing the value of a current decision on these issues against the potential waste of resources should it decide in any event not to surrender, I should find that a declaratory judgment is warranted. The uncertainty, waste of resources, and advisory nature of any decision on the merits here extend far beyond whether Aviva will ever decide to surrender, however.

That is because, even were I persuaded to attempt to resolve the issues raised under the present theoretical circumstances, such a resolution would be impossible, absent improper hypothesizing about what the record might be, should Aviva surrender.[109] The 2001 Amendments agreed to by the parties provided that under the Special Surrender Protocol, AGL had the "sole discretion" to determine the timing of payment following surrender, and the Revised Special Surrender Protocol announces that AGL will employ that discretion to delay payment, after any surrender, until the SVP Product has amortized to zero. Further, whereas the 2001 Amendments established a floor crediting rate of the Barclays Capital Aggregate Bond Index, the 2011 Supplements change that floor to the federal funds rate, which Aviva avers has historically been smaller. Consequently, Aviva requests a judicial declaration that these changes are invalid, contending that

[109] As the Defendants recognize, "[a]bsent a notice of surrender, it is impossible to determine whether and when there might be any actual economic effect resulting from the [2011 Supplements]." ZC Defs.' Op. Br. at 4.

operation of the Revised Special Surrender Protocol would have a materially adverse effect on its interests, and that adherence to this provision would constitute a breach the implied covenant of good faith and fair dealing.

Aviva, in effect, asks me to make the following findings of law and assumptions of fact: Find that the SVP Product provides Aviva with an economic return after surrender if the book value of the Sub-Portfolio exceeds its market value; assume that Aviva will choose to surrender the Policies when such a scenario exists; further assume that market conditions would be such that, if AGL were to delay payment, post-surrender, until full amortization of the value of the SVP Product, such an amortization period would be protracted; and, under that assumption, then find that such a protracted withholding of Aviva's investment would constitute a material impairment of Aviva's rights under the Policies and breach the implied covenant of good faith and fair dealing, notwithstanding AGL's bargained-for right to time such payment in its "sole discretion." At this stage, the requested determination that the change from a "sole discretion" term to a provision requiring the value of the SVP Product be zero before payment, and from the Barclays Capital Aggregate Bond Index to the federal funds rate, harms Aviva's interests in a material way such that this amendment violates the Transaction Documents, and also constitutes a breach of the implied covenant, would be unduly speculative. This is true even assuming that Aviva will,

eventually, wish to exercise its surrender right, as such a determination would be contingent on factors only knowable at the time of surrender, like the value of the SVP Product, how long it would take to amortize that amount, and what rate is to be applied.[110] In other words, since I cannot know the circumstances at the time of surrender, should I entertain this claim I would be forced to speculate, not just about whether a surrender will occur, but, if so, about what the conditions *may* be and what impact they *may* have on Aviva's interests in the Policies upon surrender. Such an opinion would be hypothetical and advisory. I conclude, therefore, that this Court's interest in deferring any consideration until a review could be made on concrete terms outweighs Aviva's interest in a present resolution of the issues.

Aviva, a sophisticated party that negotiated a contract with a "sole discretion" term and now wishes a judicial determination as to the meaning of this document based on facts that are not yet fully developed, must be satisfied with the

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[110] *See Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 688 (Del. Super. 1989) ("If . . . in the course of adjudicating this matter I would be forced to construct hypothetical factual situations on which I could then rule, this matter is not ripe for [adjudication]."); *see also K&K Screw Products, L.L.C. v. Emerick Capital Investments, Inc.*, 2011 WL 3505354, at *9 (Del. Ch. Aug. 9, 2011) ("[T]he Supreme Court has cautioned trial courts not to declare the rights of parties before they are convinced that, among other things, the material facts of the relevant dispute are static and the rights of the parties are presently defined rather than future or contingent.") (internal quotation marks omitted); *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *7 (Del. Ch. Oct. 11, 2006) ("[I]f a plaintiff's action is 'contingent,' that is, if the action requires the occurrence of some future event before the action's factual predicate is complete, the controversy is not ripe.") (internal quotation marks omitted); *Kennett v. Carlyle Johnson Mach. Co.*, 2002 WL 1358755, at *7 (Del. Ch. June 17, 2002) ("In examining [a ripeness] question, a court must . . . make a common sense determination that the plaintiff's interest in a swift resolution of the case outweighs the court's interest in postponing review until the question arises in some more concrete and final form.") (internal quotation marks omitted).

terms for which it bargained. In the absence of a ripe dispute, I may not proceed. If Aviva does, however, surrender these Policies, it can easily approach this Court for a determination as to the validity of the Revised Special Surrender Protocol at that time, if appropriate.

3. Tortious Interference

Aviva requests a declaration that "the Defendants' unjustified imposition of the 2011 Supplements would constitute tortious interference with the Policies."[111] Having found that a declaratory judgment on the validity of the 2011 Supplements is unripe, I decline to issue a declaration on whether the imposition of these Supplements involved tortious interference by the ZC Defendants.

B. *Non-Declaratory Judgment Claims*

Aviva contends that, by implementing the 2011 Supplements, AGL breached the AGL Commitment Letter, and the ZC Defendants tortiously interfered with the Policies. Aviva additionally argues that, to the extent the Revised Special Surrender Protocol codifies an exercise of AGL's "sole discretion," AGL has breached the implied covenant of good faith and fair dealing.

It is axiomatic that, as Aviva's allegations are unripe for a declaratory judgment that the Defendants' unilateral imposition of the 2011 Supplements was an invalid exercise under the Transaction Documents, and constituted tortious

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[111] Compl. ¶ 70.

interference with the Policies, they cannot correspondingly form the basis of a ripe breach of contract claim. Aviva's contractual claims, moreover, require that Aviva demonstrate that the 2011 Supplements have caused injury,[112] and as of yet, there is no evidence that Aviva has suffered any damages.[113] In fact, the damages about which Aviva complains are purely speculative, and may never materialize.[114] Therefore, having already found that a declaration as to the validity of the 2011 Supplements is unripe and that no harm has been caused by these Supplements, I dismiss these contract claims without prejudice, as the Plaintiffs may, in the future, suffer damages as a result of the 2011 Supplements sufficient to support those claims.

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[112] Under Delaware law, to establish a claim for breach of contract, a plaintiff must demonstrate three elements: "first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff." *Universal Enter. Grp., L.P. v. Duncan Petroleum Corp.*, 2013 WL 3353743, at *17 (Del. Ch. July 1, 2013) (internal quotation marks omitted). To demonstrate tortious interference with contractual relations, the following elements are required: "(1) a valid contract; (2) about which defendants knew; (3) an intentional act that is a significant factor in causing the breach of such contract; (4) without justification; (5) which causes injury." *Beard Research, Inc. v. Kates*, 8 A.3d 573, 605 (Del. Ch. 2010), *aff'd sub nom.*, *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010) (internal quotation marks omitted).

[113] As evidence of damages, Aviva avers that *if* the 55% Cap is ever triggered, the 8% annual crediting rate would effectively be eliminated. *See, e.g.*, Compl. ¶ 56; Aviva's Op. Br. at 10. Aviva, moreover, contends that the Revised Special Surrender Protocol "depriv[es] Aviva of its ability to obtain a value of the portion of the [SVP Product] . . . *should* Aviva opt to surrender the Policies." Aviva's Op. Br. at 1 (emphasis added).

[114] *See, e.g.*, *Bennett, Debra & William v. Plantations E. Condo. Assoc., Inc.*, 2013 WL 493329, at *1 (Del. Super. Jan. 16, 2013) ("Damages for breach of contract . . . cannot be speculative.").

V. CONCLUSION

For the reasons explained above, Aviva's Motion for Judgment on the Pleadings is denied, and the Defendants' Motion is granted. The Plaintiffs' Complaint is dismissed without prejudice, as the allegations therein may ripen into a justiciable controversy. An appropriate Order accompanies this Memorandum Opinion.