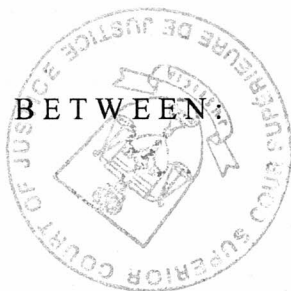


CV-22-00691702-00CP

Court File No.



**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**JUSTIN NGAN**

**Plaintiff**

**and**

**THE BANK OF NOVA SCOTIA**

**Defendant**

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

**TO THE DEFENDANT**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.


IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1,500 for costs, within the time for serving and filing your Statement of Defence you may move to have this proceeding dismissed by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's claim and \$400 for costs and have the costs assessed by the Court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date December 14, 2022

Issued by



Local Registrar

Address of  
court office:

Superior Court of Justice  
330 University Avenue  
Toronto, ON M5G 1R7

8th floor

TO: The Bank of Nova Scotia  
44 King Street West  
Toronto, ON M5H 1H1

### CLAIM

1. The Plaintiff claims the following on his own behalf, and on behalf of the Members of the Class:

- (a) \$25,000,000 as general damages;
- (b) \$5,000,000 as aggravated and/or punitive damages;
- (c) an order certifying this action as a class proceeding and appointing Justin Ngan as Representative Plaintiff;
- (d) a declaration that the terms of Part III of the *Canada Labour Code*, RSC 1985, c. L-2 ("***Canada Labour Code***" or "***CLC***") are implied terms of the Class Members' employment contracts;
- (e) a declaration that the Class Members are owed vacation and public holiday pay in respect of all unused vacation, or general holidays (or days substituted for such holidays) worked during the class period;
- (f) a declaration that all variable compensation paid to the Class is "wages" within the meaning of section 166 of the *Canada Labour Code*;
- (g) a declaration that the Defendant ("**Scotiabank**") violated its employment contracts with the Class Members by failing to pay to them the minimum vacation pay and statutory holiday pay prescribed by the *Canada Labour Code*;
- (h) a declaration that Scotiabank owed the Class a duty of good faith, which it breached;

- (i) a declaration that the Defendant was negligent and breached its duty of care owed to the Class by imposing a “use it or lose it” policy in respect of the Class Members’ vacation days, including by failing to take reasonable steps to ensure that Class Members received statutory pay in lieu of vacation days when the Class Members did not use all their contractually agreed upon vacation time;
- (j) a declaration that the Defendant was unjustly enriched by its failure to remit the minimum Vacation Entitlements (as defined below) to the Class Members, and an order requiring the Defendant to disgorge all amounts withheld by it in respect of such Vacation Entitlements;
- (k) an order, pursuant to section 24(1) of the *Class Proceedings Act, 1992*, SO 1992, c. 6, directing an aggregate assessment of damages;
- (l) an order, if necessary, directing the process for determination of individual damages;
- (m) pre- and post- judgment interest in accordance with sections 128-129 of the *Courts of Justice Act*, RSO 1990, c C.43, as amended;
- (n) the costs of this proceeding and the administration of the distribution of the trial judgment to the Class Members; and
- (o) such further and other relief as the court may deem just.

## OVERVIEW OF CLAIM

2. This proposed class action seeks compensation for Scotiabank employees on the basis that the Defendant failed to ensure that its employees received their minimum statutory entitlements for vacation pay and holiday pay, and failed to compensate them for unused vacation time (together, “**Vacation Entitlements**”).

3. In particular, the Defendant:

- (a) failed to calculate employees’ vacation pay, holiday pay, and vacation pay adjustments (“**VPAs**”) by including all “wages” as that term is defined in section 166 of the *Canada Labour Code*;
- (b) failed to make appropriate VPAs to compensate its employees in lieu of unused annual statutory minimum vacation; and
- (c) failed to adequately track employees’ vacation days and work days to ensure that the employees received their minimum Vacation Entitlements.

## PARTIES

4. Scotiabank is a multinational banking and financial services company with its corporate headquarters in Toronto, Ontario.

5. The Plaintiff, Justin Ngan, is an individual who lives in the City of Toronto, in the Province of Ontario. Mr. Ngan worked for Scotiabank for approximately 15 years. He started with Scotiabank in or about 2007 as a risk management analyst. Before he resigned from his position

with Scotiabank in or about June 2022, Mr. Ngan had been a director within the bank's Global Risk Management Group for approximately eight years.

6. In this action, Mr. Ngan seeks to represent the following persons:

All persons who were employed by the Bank of Nova Scotia in Canada, excluding officers, directors, and C-suite executives, during the Class Period, where the Class Period is from December 12, 2020 until the date of certification of this action (the "**Class**" or "**Class Members**"), including a Sub-Class of all Class Members who received incentive awards or other forms of variable compensation in addition to their hourly wages or salary.

## THE FACTS

### Vacation Entitlements under the *Canada Labour Code*

7. Pursuant to section 184 of the *CLC*, employees in federally-regulated workplaces are entitled to various lengths of vacation depending on the duration of each employee's tenure.

Section 184 stipulates that:

Except as otherwise provided by or under this Division, in respect of every year of employment by an employer, every employee is entitled to and shall be granted a vacation with vacation pay of:

- (a) at least two weeks if they have completed at least one year of employment;
- (b) at least three weeks if they have completed at least five consecutive years of employment with the same employer; and
- (c) at least four weeks if they have completed at least 10 consecutive years of service with the same employer.

8. Pursuant to section 184.01 of the *CLC*, employees are entitled to minimum amounts of compensation for vacation depending on the duration of their employment. It provides:

An Employee is entitled to vacation pay equal to:

- (a) 4% of their wages during the year of employment of which they are entitled to the vacation;

- (b) 6% of their wages during the year of employment in respect of which they are entitled to vacation, if they have completed at least five consecutive years of employment with the same employer; and
- (c) 8% of their wages during the year of employment in respect of which they are entitled to vacation, if they have completed at least 10 consecutive years of employment with the same employer.

9. For the purposes of calculating Vacation Entitlements, section 166 of the *CLC* defines “wages” as including “every form of remuneration for work performed”, excluding tips and other gratuities. According to the Government of Canada’s *Interpretations, Policies and Guidelines (IPGs): Labour Program*, “wages” within the meaning of the *CLC* includes commissions on sales and production and safety bonuses.

10. Section 192 of the *CLC* also provides that employees are entitled to a holiday with pay on each of the general (statutory) holidays falling within any period of their employment.

11. Section 196(1) requires that holiday pay be “equal to at least one twentieth of the wages, excluding overtime pay, that the employee earned with the employer in the four-week period immediately preceding the week in which the general holiday occurs.”

12. Section 197 provides that an employee who is required to work on a day on which they are entitled to holiday pay shall be paid in addition to the holiday pay for that day, wages at a rate equal to at least one and one-half times their regular rate of wages for the time that they work on that day.

### **Scotiabank’s Vacation Policy**

13. Scotiabank’s employment agreements with Members of the Class incorporate Scotiabank’s vacation policy (the “**Vacation Policy**”).

14. The Vacation Policy governs employees' Vacation Entitlements (*i.e.*, vacation allotment, vacation scheduling, and VPAs to be paid to all Scotiabank employees in Canada), and incorporates the minimum Vacation Entitlements set out in the *CLC*.

15. In the version of the Vacation Policy last revised in or about January 2022, section 4.1 (General Information) states:

In accordance with **Canada Labour Code** requirements, salary paid to you during your paid vacation period must at least equal the application percentage of your actual Vacationable Earnings during the period for which you earned your vacation allotment [.]

You are entitled to a Vacation Pay Adjustment when your vacation pay is less than the applicable percentage of your vacationable earnings pursuant to the Canada Labour Code, set out below:

Total Years of Continuous Employment	Vacation Pay Adjustment Percentage
Less than five years	4%
Five Years to less than ten years	6%
Ten Years or more	8%

Your vacationable earnings include your salary, overtime and other allowances, as well as any short-term disability benefits. They do not include incentive pay or cash awards, any reimbursements of expenses or Long-term Disability Payments. [Emphasis added]

16. The employees' entitlement to a VPA when their vacation pay is "less than the applicable percentage of [their] vacationable earnings pursuant to the *Canada Labour Code*" means that Scotiabank agrees to pay its employees for any unused vacation time up to the statutory minimums in sections 184 and 184.01 of the *CLC*.

17. Section 4.1 of the Vacation Policy expressly excludes incentive pay and cash awards from "vacationable earnings". This exclusion directly contradicts the *CLC*'s formula for minimum

vacation pay entitlement, as incentive pay and cash awards are part of the Sub-Class Members' remuneration for work performed.

18. The Vacation Policy explicitly incorporates the *CLC*'s minimum Vacation Entitlements.

Section 6.3 (Disclaimer) of the Vacation Policy states:

To the extent that this policy addresses statutory entitlements, it addresses those under the *Canada Labour Code*. If your statutory entitlements exceed the entitlements described in this policy, those statutory entitlements will prevail. If the entitlements in this policy overlap with, or provide a greater right or benefit than, any statutory entitlements, the entitlements outlined in this policy will be deemed to satisfy those statutory entitlements to the extent of the overlap. [Emphasis added]

### **The application of Scotiabank's Vacation Policy**

#### ***Scotiabank systemically miscalculates vacation and holiday pay***

19. Scotiabank does not include variable compensation in its calculation of vacation pay and public holiday pay owing to each employee. This is a breach of sections 166, 184.01, and 196 of the *CLC*.

20. Scotiabank's failure or refusal to calculate vacation pay and public holiday pay based on the totality of an employee's wages, including variable compensation; has resulted in it underpaying and continuing to underpay Sub-Class Members, contrary to sections 166, 184.01, and 196 of the *CLC*.

#### ***Scotiabank systemically fails to provide VPAs for unused vacation days***

21. Scotiabank does not make VPA payments for the Class Members' unused statutory minimum vacation time. By failing to either ensure that their employees took their statutory minimum vacation or make appropriate VPA payments to compensate its employees in lieu of

unused annual statutory minimum vacation,, Scotiabank is in breach of the minimum standards established by s. 184 of the *CLC*, and has breached the Class Members' employment contracts.

***Scotiabank's "use it or lose it" policy is a systemic barrier to employees' receiving their Vacation Entitlements***

22. The objective of the Vacation Policy, as set out in section 1.1, is to "promote personal wellness by ensuring that all eligible employees in Canada are taking the appropriate time off work."

23. Scotiabank enforces an aggressive "use it or lose it" policy with respect to employees' Vacation Entitlements, which it communicates to employees through section 2.2 of the Vacation Policy:

You are required to take your vacation time in the year in which it's earned. In some cases, work or personal issues may prevent you from taking your full vacation allotment in the year it's earned. In these instances, you may carry any unused vacation time over until October 31 of the following calendar year. **Any vacation time not used will expire on this date and will no longer be available to you.** [Emphasis in original]

24. This provision means that if employees do not take all of their Vacation Entitlements, the unused vacation time will not be carried forward beyond October 31<sup>st</sup> of the year following, and the employee is not compensated for the unused vacation.

25. The "use it or lose it" policy is uniformly enforced and is communicated to Scotiabank's employees by its human resources personnel. As a result of this policy, Scotiabank fails or refuses to ensure that Members of the Class receive their minimum Vacation Entitlements owing under the *CLC*.

26. The manner in which Scotiabank enforces the Vacation Policy creates a systemic barrier to employees obtaining their minimum Vacation Entitlements under the Policy and under the *CLC*.

27. Due to the Vacation Policy's misleading provisions regarding VPA entitlement and Scotiabank's aggressive "use it or lose it" messaging, Scotiabank employees who do not wish to let their vacation "expire" tend to book time off in hopes that they will be able to use it before the expiry date.

28. In reality, while some employees who take this route are able to use their vacation time as intended, many end up working on the days that they had intended to take as vacation due to the practical demands of their jobs. The Defendant does not keep track of days worked by its employees when time had been booked off. Scotiabank's records therefore are inaccurate, resulting in Class Members not receiving the VPA to which they are entitled.

29. The onset of the COVID-19 pandemic in March 2020 exacerbated this problem. The boundaries between work time and personal time became even more blurred as most Scotiabank employees transitioned to a "work from home" environment.

30. Scotiabank has no controls, policies, or audits in place to ensure employees are not working during their booked vacation time, or to record the time as worked rather than as vacation, if the employee works during the time that they had scheduled for a vacation. Scotiabank does not pay VPA to its employees to compensate for the days worked during what was scheduled as a vacation day. Scotiabank is unjustly enriched as a result thereof. There is no juristic reason for Scotiabank to retain vacation pay owing to employees who have worked on scheduled vacation days.

#### **The Plaintiff's experience with Scotiabank**

31. Throughout his employment at Scotiabank, Mr. Ngan's compensation package included a base salary (paid on a bi-weekly basis), and variable compensation in the form of a Restricted Share Unit ("RSU") Award and an Incentive Award. Scotiabank states that "Annual incentive pay

rewards you for business performance as well as your individual success in what you achieved against your annual performance goals and how you accomplished it throughout the year.”

32. Restricted share units (RSUs) are a form of compensation that awards company value to employees. This form of compensation is structured to function as a long term incentive. At Scotiabank, RSUs vest over three years, and are paid out in cash at the end of the vesting period. RSUs are income in the year in which they vest. Throughout his time at Scotiabank, RSUs formed a core and significant part of Mr. Ngan’s total compensation.

33. Mr. Ngan’s Incentive Award was calculated based on an Annual Incentive Plan target of 20% of his base salary, adjusted using an Individual Performance Factor and a Business Factor. For example, in 2020-2021, his Individual Performance Factor was 145%, and the Business Performance Factor was 88%. His Annual Incentive Plan payment for that year was 25.52% of his base salary. Throughout his time at Scotiabank, the Incentive Award formed a core and significant part of Mr. Ngan’s total compensation.

34. While adjusted for business and individual performance, the Incentive Awards are calculated using a formula, and are a regular and predictable part of Sub-Class Members’ total compensation. Absent very serious performance concerns, Scotiabank consistently paid Incentive Awards, even during recessions. During Mr. Ngan’s 15 years at Scotiabank, he received an Incentive Award every year.

35. Mr. Ngan’s original employment agreement dated June 28, 2007 with Scotiabank expressly provided that he “[would] receive vacation days in accordance with Bank policy” (*i.e.*, Scotiabank’s Vacation Policy). As set out below, the Defendant breached its agreement with the Plaintiff.

36. Mr. Ngan thereafter became a full-time employee entitled to earn Incentive Awards, and is therefore a member of the Sub Class.

37. Mr. Ngan's vacation pay and public holiday pay did not account for his annual variable compensation, including both his Incentive Award, which was directly tied to both work performed and job performance, and his Restricted Share Unit Award. Scotiabank calculated his vacation and holiday pay based on its definition of "vacationable earnings" in section 4.1 of the Vacation Policy, and not in accordance with the *CLC*'s definition of "wages".

38. When Mr. Ngan and other Scotiabank employees received VPAs, these were calculated based on the Defendant's definition of "vacationable earnings" rather than in accordance with the *CLC*'s definition of "wages". The result was that Mr. Ngan and the Sub Class Members received less than the minimum Vacation Entitlements owed to them under the *CLC*.

39. In failing to calculate Mr. Ngan's and the Sub Class Members' Vacation Entitlements based on all of their wages (including variable compensation), Scotiabank breached the terms of their employment contracts and its obligations under the *CLC*.

40. In 2020 and 2021, Mr. Ngan was unable to use all his vacation time allotted for 2020, and it expired on October 31, 2021. Scotiabank failed to pay Mr. Ngan VPA for the unused minimum vacation time, contrary to the *CLC* minimum requirement.

41. When Mr. Ngan sought payment in lieu of his expired 2020 *CLC* minimum Vacation Entitlements, Scotiabank Human Resources Services representatives repeatedly advised him that he was not entitled to such payment in lieu of vacation because the vacation was "lost".

42. Mr. Ngan escalated the matter to Scotiabank's legal team. If not for this escalation, he would not have been paid his 2020 VPA.

43. After finally receiving a VPA for his unused 2020 CLC vacation entitlement, Mr. Ngan suggested to Scotiabank Human Resources that Scotiabank update its Vacation Policy to clearly communicate to its employees that they are entitled by law to a VPA for unused Vacation Entitlements. Scotiabank declined.

44. When Mr. Ngan received the 2020 VPA payment, it was calculated only on his base salary, and did not include his 2020 Incentive Award, or the value of RSUs that vested in 2020.

**Scotiabank's breaches of its contractual, statutory and common law duties**

45. Scotiabank owed the Class a contractual, statutory and common law duty to keep track of all the days of work performed by its employees, and to pay its employees all of their contractual entitlements, including the minimum statutory Vacation Entitlements under the *CLC*.

46. Scotiabank's failure to pay holiday and vacation pay based upon the whole of the Sub-Class Members' wages is a breach of its employment contracts with Sub-Class Members and a breach of the *CLC*.

47. Scotiabank was negligent in failing to track the days when its employees worked, including days when the employees were entitled to be on vacation, and to compensate the employees at the contractual rates of pay and statutory minimum wages for all hours worked.

48. These breaches, including Scotiabank's systemic underpayment of Vacation Entitlements, unjustly enriched Scotiabank at the expense of the Class.

## **BREACH OF CONTRACT AND BREACH OF THE DUTY OF GOOD FAITH**

49. Scotiabank is contractually obligated to provide its employees with their minimum statutory entitlements under the *CLC*, as incorporated into the Class Members' employment contracts.

50. At all times, Scotiabank owed the Class a duty to act honestly and in good faith in discharging its contractual obligations to the Class. This included a duty not to misrepresent its obligations to its employees, and a duty not to frustrate its employees' claims to their entitlements.

51. Scotiabank breached its contractual obligations to Class Members, including its duty of honesty and good faith, by, *inter alia*:

- (a) failing to account for the totality of a Sub-Class Member's wages when calculating their vacation pay, public holiday pay, and VPAs;
- (b) failing to comply with the minimum standards in the *CLC* in the regular payment of VPAs, and by adopting a system and pay practices in contravention of those requirements;
- (c) failing to advise its employees of their minimum entitlements under their employment contracts, which incorporates the *CLC*;
- (d) misrepresenting to Sub-Class Members that calculations of their vacation pay and public holiday pay entitlements could not include variable compensation earned, when this is a statutory requirement;
- (e) adopting, aggressively advertising, and implementing a "use it or lose it" policy that failed to compensate Class Members for unused vacation;

- (f) failing to monitor and audit its vacation and public holiday practices to ensure Class Members were properly compensated according to their contracts; and
- (g) adopting, implementing and maintaining a system and pay practices that fail to properly record, monitor, audit, calculate, segregate, detail/enumerate, and actually pay Class Members for vacation pay and holiday pay, and that misrepresented, frustrated, and concealed Class Members' entitlement to same.

52. Scotiabank abused its position of trust *vis-à-vis* Class Members by misrepresenting the Class Members' contractual entitlements, failing to pay the VPA when owed, implementing and enforcing a "use it or lose it" policy that included not paying statutory minimum vacation and holiday pay and failing to monitor employees who may have been working during vacation time.

53. The Class Members suffered damages as a result of the above breaches of contract and breaches of the duty of good faith, the full particulars of which will be established at trial.

## **NEGLIGENCE**

54. Scotiabank, as the employer of Mr. Ngan and Members of the Class, owed them a duty of care to take reasonable steps to ensure that they received all minimum statutory vacation and holiday pay entitlements.

55. In permitting the breaches identified at paragraph 51, above, Scotiabank fell below the applicable standard of care.

56. The Class Members suffered damage as a result of Scotiabank's negligence as set out above, the full particulars of which will be established at trial.

### **UNJUST ENRICHMENT**

57. Scotiabank has been unjustly enriched by withholding money that is rightfully owed to the Plaintiff and Class Members by refusing to pay the contractually required vacation pay and public holiday pay.

58. The Plaintiff and Class Members have suffered a deprivation corresponding to Scotiabank's enrichment.

59. There is no juristic reason for Scotiabank to retain this enrichment.

### **AGGRAVATED AND/OR PUNITIVE DAMAGES**

60. This case is appropriate for an award of aggravated and/or punitive damages, for the following reasons:

- (a) Scotiabank instituted and enforced a vacation policy that intentionally undercompensated its employees for the vacation and general holiday pay to which the employees are entitled by statute;
- (b) Scotiabank benefitted from its employees being systematically underpaid, forced to let their vacation "expire" without pay in lieu, and permitted to work during booked vacations, for which there ought to be more of a punishment than merely paying Class Members the money initially owed to them;
- (c) Scotiabank unjustly enriched itself at the expense of its employees, thus exploiting an imbalance in power;

- (d) Scotiabank's conduct displays intentional disregard for, or at the least ignorance, carelessness, and serious negligence of employees' rights, and the obligations it has to employees contractually and under the *CLC*; and
- (e) the principle of deterrence dictates for punitive damages to be awarded to discourage other large corporations from underpaying their workers, as Scotiabank has in this case.

#### LOCATION

61. Mr. Ngan proposes this action be tried at the City of Toronto, in the Province of Ontario.

December 12<sup>th</sup>, 2022

**WADDELL PHILLIPS  
PROFESSIONAL CORPORATION**  
36 Toronto Street, Suite 1120  
Toronto, ON M5C 2C5

**W. Cory Wanless (LSO No.: 57288M)**  
[cory@waddellphillips.ca](mailto:cory@waddellphillips.ca)  
**Jonathan Schachter (LSO No.: 63858C)**  
[jonathan@waddellphillips.ca](mailto:jonathan@waddellphillips.ca)

Tel: 647-261-4486

**RANDY AI LAW OFFICE**  
250 Yonge Street, Suite 2201,  
Toronto, ON M5B 2M6

**Randy Ai (LSO No.: 58514F)**  
[randy@randyai.com](mailto:randy@randyai.com)

Tel: 416-549-8004

Lawyers for the Plaintiff

JUSTIN NGAN  
Plaintiff

-and-

THE BANK OF NOVA SCOTIA  
Defendant

Court File No.:

CV-22-00691702-0001

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

STATEMENT OF CLAIM

**WADDELL PHILLIPS  
PROFESSIONAL CORPORATION**  
36 Toronto Street, Suite 1120  
Toronto, ON M5C 2C5

**RANDY AI LAW OFFICE**  
250 Yonge Street, Suite 2201,  
Toronto, ON M5B 2M6

**W. Cory Wanless (LSO No.: 57288M)**  
[cory@waddellphillips.ca](mailto:cory@waddellphillips.ca)  
**Jonathan Schachter (LSO No.: 63858C)**  
[jonathan@waddellphillips.ca](mailto:jonathan@waddellphillips.ca)  
Tel: 647-261-4486

**Randy Ai (LSO No.: 58514F)**  
[randy@randyai.com](mailto:randy@randyai.com)  
Tel: 416-549-8004

Lawyers for the Plaintiff