IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Ryan Sweeney and Bryan Marshall, as individuals, and on behalf of all others similarly situated, and on behalf of the Nationwide Savings Plan,

Plaintiffs,

vs.

Nationwide Mutual Insurance Company; Nationwide Life Insurance Company; and the Investment Committee of the Nationwide Savings Plan, David Berson, David LaPaul, Kevin O'Brien, Klaus Diem, Michael Mahaffey, and Michael P. Leach,

Defendants.

Case No. 2:20-CV-01569-SDM-CMV

Judge Sarah D. Morrison

Magistrate Judge Chelsey M. Vascura

PLAINTIFFS' MOTION TO EXCLUDE LEGAL OPINIONS OF DEFENDANTS' EXPERT WITNESSES

MOTION

Pursuant Federal Rules of Evidence 702 and 704, and the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), Plaintiffs Ryan Sweeney and Bryan Marshall ("Plaintiffs") hereby move this Court for an Order excluding certain legal opinions offered by Defendants' expert witnesses Kelly Driscoll and Wesley C. Whiteman. This Motion is based on the accompanying memorandum; the opinions and testimony offered by Ms. Driscoll and Mr. Whiteman; all other files, records, and pleadings in this action; any oral argument that may be presented at the hearing of this Motion; and all other matters that the Court deems proper.

MEMORANDUM IN SUPPORT

INTRODUCTION

Plaintiffs bring this motion under Federal Rules of Evidence 702 and 704 to exclude inadmissible testimony offered by two of Defendants' expert witnesses that invade the province of the Court and offer legal interpretations and conclusions.

As described in prior filings, there are numerous complex legal issues in this case. These include whether Nationwide satisfied the requirements of 29 CFR § 2550.401c-1, such that the GIF may be deemed a "Transition Policy," and whether Nationwide met the requirements of the prohibited transaction exemption in 29 U.S.C. § 1108(b)(5), including that it received "no more than adequate consideration." *See, e.g.,* Order Denying Motion to Dismiss, ECF 64, at 9-10, 13-14. In addition, there are questions relating to whether Defendants satisfied their fiduciary obligations in 29 U.S.C. § 1104, including their duties of prudence and loyalty. *See id.* at 10-11.

On June 24, 2024, Defendants served expert reports from Wesley C. Whiteman and Kelly Quinn Driscoll (as well as a third expert, Robert Cahill). On July 27, 2024, these same experts submitted rebuttal reports in response to the report of Plaintiffs' expert, Dr. Richard Kopcke. Defendants' expert reports are problematic for numerous reasons, but the focus of this motion is narrow. Specifically, Mr. Whiteman and Ms. Driscoll greatly overstep the permissible limits of expert testimony and offer legal opinions and conclusions on multiple issues. For example:

- [redacted]

- [redacted]

These are obviously impermissible legal opinions and conclusions. In addition, Mr. Whiteman and Ms. Driscoll render numerous other impermissible legal opinions that Plaintiffs have highlighted. *See* Schutz Decl. Exs. 1-4. For the reasons explained below, these legal opinions and conclusions should be excluded.

STANDARD OF REVIEW

The admissibility of expert testimony is governed by Federal Rule of Evidence 702, which states that where specialized knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue," a witness qualified as an expert "may testify in the form of an opinion or otherwise if: . . . (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702. This Rule imposes a "gatekeeping" function on the court that ensures "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579, 597 (1993); *Berry v. City of Detroit*, 25 F.3d 1342, 1350 (6th Cir. 1994). The proponent of the expert testimony bears the burden of proving its admissibility. *See* Fed. R. Evid. 104(a); *Sigler v. Am. Honda Motor Co*., 532 F.3d 469, 478 (6th Cir. 2008).

While an expert's testimony may "embrace[] an ultimate issue," Fed. R. Evid. 704(a), such expert "may not testify to a legal conclusion." *Hyland v. HomeServices of Am., Inc*., 771 F.3d 310, 322 (6th Cir. 2014); *Diamond Transportation Logistics, Inc. v. Kroger Co., Inc.*, 649 F. Supp. 3d 608, 618 (S.D. Ohio 2023) (Morrison, J.), *aff'd sub nom. Diamond Transportation Logistics, Inc.*

v. Kroger Co., 101 F.4th 458 (6th Cir. 2024) (excluding expert witness testimony that "uses 'specialized legal terminology' to render conclusory opinions" that amount to "impermissible legal conclusions."). This limitation prohibits an expert from opining either to the interpretation of applicable legal requirements or to a party's adherence to those requirements. *In re Natl. Prescription Opiate Litig.*, 2019 WL 3934490, at *4 (N.D. Ohio Aug. 20, 2019) (excluding expert testimony about DEA regulations and defendants' compliance with those regulations, explaining "an expert generally may not opine as to what the law requires, or whether Defendants' conduct violated the law"); *McGuffey v. Neil*, 2020 WL 509416, at *4 (S.D. Ohio Jan. 15, 2020) (excluding expert testimony that "employs the specialized language of employment discrimination law, attempts to define those terms, expounds extensively on applicable case law, and ultimately instructs the jury to conclude that Defendants have met their burden under" applicable law); *see also Troudt v. Oracle Corp.*, 369 F. Supp. 3d 1134, 1142-43 (D. Colo. 2019) ("An opinion that defendants breached their duties under ERISA leaves no room for the factfinder to do its job but essentially directs judgment in plaintiffs' favor.").

ARGUMENT

I. THE DRISCOLL AND WHITEMAN REPORTS OFFER LEGAL OPINIONS

A. The Driscoll Report and Rebuttal Contains Numerous Legal Opinions

Kelly Quinn Driscoll is an attorney [redacted] Ms. Driscoll submitted an opening expert report on June 24, 2024, in which she opined that [redacted]

[redacted].

Central to Ms. Driscoll's opinions was the premise that [redacted] To form this remarkable premise [redacted] Ms. Driscoll undertook a legal exercise [redacted]

B. The Whiteman Report and Rebuttal Contains Numerous Legal Opinions

[redacted]

[1] *See* ECF 67 at 10 & 14; ECF 135 at 6; ECF 145 at 5-6; ECF 158 at 4-6; ECF 172 at 12-13.

[redacted] Although not a lawyer, Mr. Whiteman also offers testimony on numerous legal issues.

First, [redacted]

Second, [redacted]

II. THE EXPERTS' LEGAL OPINIONS SHOULD BE EXCLUDED

Both Ms. Driscoll and Mr. Whiteman have invaded the Court's province by offering legal interpretations and by applying facts to law to render legal conclusions. Their offending opinions, which are summarized above and highlighted in the attached Exhibits 1-4, therefore must be excluded. *See Hyland*, 771 F.3d at 322.

A. The Offending Driscoll Opinions Should Be Excluded

Ms. Driscoll's opinions invade the province of the Court in two principal respects.

First, Ms. Driscoll repeatedly opines on the ultimate legal question of [redacted]. This was not a mere slip of the tongue. [redacted]

An expert that speaks to a party's compliance or non-compliance with the law is offering an improper legal conclusion. *Troudt*, 369 F. Supp. 3d at 1142-43; *In re Natl. Prescription Opiate Litig.*, 2019 WL 3934490, at *4; *McGuffey*, 2020 WL 509416, at *4. *Troudt* is particularly instructive here. In *Troudt*, a fiduciary process expert—serving the same role as Ms. Driscoll—opined to both the standards set forth in ERISA and whether the respective fiduciaries satisfied those standards. *Id.*, 369 F. Supp. 3d at 1142. The Court excluded this opinion, explaining that "the question whether a fiduciary has acted prudently under ERISA is informed by legal precepts and precedents to which [the expert] may not testify." *Id.* Like the excluded expert from *Troudt*, Ms. Driscoll does not speak merely to industry standards, but instead opines on the ultimate legal question of [redacted]

Second, in order for Ms. Driscoll to render her improper legal conclusions, she undertook [redacted] This was improper. "[E]xpert witnesses may not testify to legal conclusions or to the applicability or interpretation of a particular statute or regulation." *Caton v. Salamon*, 2024 WL 4226930, at *4 (S.D. Ohio Sept. 18, 2024) (quoting *McMillen v. Windham*, 2019 WL 4017240, at *21 (W.D. Ky. Aug. 26, 2019)); *see also Cummins v. BIC USA, Inc.*, 2011 WL 2633959, at *2 (W.D. Ky. July 5, 2011) (excluding expert interpretation of certain provision of Code of Federal Regulations); *RLJCS Enters. Inc. v. Prof'l Benefit Tr., Inc.*, 2005 WL 3019398, at *4-5 (N.D. Ill. Nov. 8, 2005) (excluding practicing attorney's "report th[at] analyzes ERISA, Department of Labor regulations, and Trust documents and opines" regarding whether "defendants breached their fiduciary duties under ERISA" because it "consists entirely of improper legal argument.").

In excluding expert testimony in a case involving alleged fiduciary breaches under ERISA, one court in this circuit stated, "The vast majority of these experts' testimony and opinions are legal conclusions, namely whether Defendants' purported actions are violations of ERISA. Expert testimony is not proper for issues of law." *Greene v. Drobocky*, 2014 WL 3955288, at *3 (W.D. Ky. Aug. 13, 2014). In another case, tried to the bench, involving whether Defendants acted prudently under 29 U.S.C. § 1104(a) in managing a retirement plan, one court held that a proffered expert "may not opine as to the ultimate legal conclusion regarding prudence (e.g., she cannot make statements such as "NYU acted prudently" or the like)." *Sacerdote v. N.Y. Univ.*, No. 1:16-

cv-06284, ECF 270 (S.D.N.Y. Apr. 5, 2018).[2] Similarly, in a case involving allegations of improper withdrawals from a deferred compensation retirement plan, the court excluded proposed expert testimony about "the legal standards relevant to the CARES Act and Section 457(b) of the Internal Revenue Code, and how those legal standards should apply to the facts of this case." *United States v. Mosby*, 626 F. Supp. 3d 847, 862 (D. Md. 2022); *see also United States v. Bilzerian*, 926 F.2d 1285, 1295 (2d Cir. 1991) (upholding the exclusion of the testimony of a former Securities Exchange Commission division director as to the industry meaning of the term "personal funds" when it bore directly on the allegations in the indictment). This Court should reach the same result.

Indeed, not only is Ms. Driscoll's legal analysis improper and inadmissible, but it is also deeply flawed. At a high level, she opines that [redacted] *See* 65 Fed. Reg. 614, 618 (Jan. 5, 2000) ("If the fiduciary believes that there are additional items of information which must be reviewed to evaluate a Transition Policy, ***the Department encourages*** the fiduciary to request, or to negotiate for, where appropriate, such information from the insurer.") (emphasis added). [redacted]

[2] This ruling involved Plaintiffs' rebuttal expert here, Marcia Wagner. Ms. Wagner was ultimately allowed to testify within the bounds set by the court, and the court determined that she gave "reasoned, factually-based testimony" at trial that "provided helpful information to the Court on industry standard processes." *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 303 n.67, 305 (S.D.N.Y. 2018). Consistent with the *Sacerdote* court's ruling, Ms. Wagner does ***not*** offer legal opinions here–unlike Ms. Driscoll–on whether Defendants acted prudently.

[redacted] actions a ***self-dealing*** fiduciary must take to satisfy the "adequate consideration" prong of Defendants' affirmative defense to Plaintiffs' prohibited transaction claims, and the underlying requirement that the fiduciary make a good faith effort to determine fair market value on the basis of "complete and accurate information." *See Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 431, 435 (6th Cir. 2002). [redacted]

That is not all. The GIF and its features fall outside the meaning of "fixed return" investment as used in those regulations. Specifically, the DOL stated that an expense ratio does not need to be included in periodic disclosures to participants for an investment "with respect to which the return is fixed for the term of the investment." 29 CFR 2550.404a-5(d)(iv)(B). [redacted]

Moreover, [redacted]

[redacted] As Nationwide's Director of Benefits Plans described to the Plan's investment consultant, Callan, the Guaranteed Fund "is not a GIC [guaranteed investment contract] since the rate of return is based on the actual rate of return of the investments." Schutz Decl. Ex. 7. And as the Stable Value Investment Association acknowledges, where stable value products "have crediting rates that are reset using contractual formulas to pass through the investment performance of the underlying assets," the insurer must "provide detailed listings of the underlying portfolio holdings to plan sponsors as well as meet the Department of Labor's fee disclosure requirements." *Id.* Ex. 8, at NMIC_225616. [redacted].[3]

[redacted] is a matter for this Court to decide, not Ms. Driscoll. Her attempts to [redacted] far exceeds

[3] Numerous other flaws with Ms. Driscoll's novel regulatory interpretation are set forth in the Rebuttal Report of Plaintiffs' expert, Marcia Wagner. *See* Schutz Decl. Ex. 9 at ¶ 166-183. If the Court excludes Ms. Driscoll's legal opinions regarding [redacted], Plaintiffs will voluntarily withdraw Ms. Wagner's rebuttal analysis of [redacted] same [redacted]. Ms. Wagner was engaged to offer opinions regarding [redacted] solely to correct Ms. Driscoll's flawed analysis. Without knowing whether the Court would exclude Ms. Driscoll's improper opinions, Plaintiffs did not wish to be unilaterally disarmed on the points raised.

the permissible bounds of admissible expert testimony and should be excluded. *See Berry*, 25 F.3d at 1353 (explaining "[i]t is the responsibility of the court, not testifying witnesses, to define legal terms."); *In re Natl. Prescription Opiate Litig.*, 2019 WL 3934490, at *4; *McGuffey*, 2020 WL 509416, at *4.

B. The Offending Whiteman Opinions Should Be Excluded

Mr. Whiteman opines generally that [redacted] These are all improper legal conclusions and must be excluded. *See Hyland*, 771 F.3d at322; *Caton*, 2024 WL 4226930, at *4; *Cummins*, 2011 WL 2633959, at *6; *see also Ruppert v. Alliant Energy Cash Balance Pension Plan*, 716 F. Supp. 2d 801, 806 (W.D. Wis. 2010) (excluding expert testimony that included "assessment of the requirements of ERISA and the IRC"); *Alco Indus., Inc. v. Wachovia Corp.*, 527 F. Supp. 2d 399, 409 (E.D. Pa. 2007) (excluding testimony where a "glance at [expert's] 'questions presented' reveals that his report addresses legal, not factual, questions," such as "Did the Defendants violate their ERISA fiduciary duty…?"); *Wheeler v. Pension Value Plan for Emps. of Boeing Co.*, 2007 WL 2608875, at *14 n.3 (S.D. Ill. Sept. 6, 2007) ("To the extent this evidence consists of expert opinion testimony on questions of law, e.g., the legal meaning of ERISA and its implementing regulations, the Court has disregarded that evidence."); *Bona v. Barasch*, 2003 WL 21222531, at *2 (S.D.N.Y. May 27, 2003) (excluding testimony where expert had "offer[ed] a legal opinion as to whether individual provisions in the agreements constitute per se violations of

ERISA"); *Gray v. Briggs*, 45 F. Supp. 2d 316, 323-24 (S.D.N.Y. 1999) (excluding expert's opinion regarding whether defendant "violated ERISA" because the opinion "constitute[s] an 'attempt to substitute the expert's judgment for the Court's'") (cleaned up).

Defendants' compliance with ERISA's statutory and regulatory provisions—including Sections 408(b)(5) and 401-c—are legal conclusions. Defendants have ***twice*** asked this Court to reach these conclusions, without success. *See Sweeney v. Nationwide Mut. Ins. Co*., 2022 WL 874851, at *5 (S.D. Ohio Mar. 24, 2022) (denying Defendants' motion to dismiss based on a transition policy "safe harbor" and 1108(b)(5), explaining "the Court cannot now determine whether Defendants are entitled to the safe harbor and does not reach the issue of what, if any, impact the safe harbor has on Plaintiffs' claims"); *Sweeney v. Nationwide Mut. Ins. Co.*, 2023 WL 6383453, at *4 (S.D. Ohio Sept. 29, 2023) (denying Defendants' motion for summary judgment on similar basis). [redacted]

Mr. Whiteman has no place [redacted] This is grounds for exclusion. *See Diamond Transportation Logistics*, 649 F. Supp. 3d at 618; *McGuffey*, 2020 WL 509416, at *4.

Moreover, Mr. Whiteman's ultimate legal conclusions are unsupported. For instance, [redacted] also ignores that the "adequate consideration" requirement in ERISA § 408(b)(5) has a procedural prong. *Chao*, 285 F.3d at 437. [redacted] without making ***any*** determination whether the BIC assessed the fair market value of the GIF "in good faith … pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary," 29 U.S.C. § 1002(18)(B).

Mr. Whiteman's opinion that [redacted] is similarly unsupported. For instance, [redacted]

Similarly, despite the pertinent regulations requiring that the insurer provide the Plan a Disclosure that includes, among other things, a "description of the method by which the insurer determines the return to be credited to any accumulation fund under the policy," 29 C.F.R.

2550.401c-1(c)(3)(i)(B), [redacted] Even if Mr. Whiteman was permitted to speak to [redacted], he cannot do so in such a perfunctory manner. "The safe harbor applies only if certain conditions are met." *Sweeney*, 2022 WL 874851, at *5. [redacted]

CONCLUSION

For the foregoing reasons, the opinions of Wesley Whiteman and Kelly Driscoll that are described in this Motion and highlighted in the attached Exhibits 1-4 should be excluded.

Dated: November 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2024, I electronically filed the foregoing with attachments with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel for Defendants, and I caused an electronic copy of the same documents, including those subject to a motion for leave to seal, to be served on Defendants' counsel of record.

s/ Kai H. Richter
Kai H. Richter