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 FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

LOCAL RULE 7.2 TABLE OF CONTENTS AND SUMMARY

MOTION v

INTRODUCTION 1

Defendants have a problem. They had a fiduciary duty to monitor the expenses of the Guaranteed Fund under 29 U.S.C. § 1104, and monitoring the Guaranteed Fund's expenses is also the key element of the only defenses they have identified to Plaintiffs' prohibited transaction claims under § 1106. But it is undisputed that [redacted]. They also failed to follow the documents and instruments of the Nationwide Savings Plan, in violation of 29 U.S.C. § 1104(a)(1)(D). As a result, Plaintiffs are entitled to summary judgment as to liability on their breach of fiduciary duty and prohibited transaction claims.

BACKGROUND 3

I. The NSP and the Benefits Investment Committee ("BIC") 3

II. The Plan's Investment Policy Statement 4

III. The Guaranteed Fund 5

A. The Plan's Investment in the Guaranteed Fund 5

B. The GIF's Contract 6

C. The Plan Document 7

D. The GIF's Crediting-Rate Methodology [redacted] 7

IV. The BIC's Failure to Monitor the GIF's Fees and Expenses During the Class Period 8

A. Callan's 2008 Analysis [redacted] 8

B. After Callan's 2008 Analysis, Defendants Shielded the GIF's Expenses from Further Review by Callan .....

C. [redacted] 10

D. The BIC Failed to Monitor the GIF's Fees or Expenses 14

V. Procedural History 16

ARGUMENT 18

Two undisputed facts carry undeniable legal consequences for Defendants and entitle Plaintiffs to summary judgment. First, Defendants did not monitor the GIF's fees or expenses and the resulting consideration to Nationwide in connection with the GIF. Second, Defendants failed to ensure the GIF was administered in accordance with its contract and with the Plan Documents. As a result: (1) Defendants cannot prove that the Plan paid "no more than adequate consideration"

and therefore cannot prove a necessary element of their affirmative defense under 29 U.S.C. § 1108(b)(5); (2) the GIF's contract is not a "Transition Policy"; (3) the GIF assets [redacted] were Plan assets; and (4) Defendants breached their fiduciary duties.

I. Defendants Engaged in Prohibited Transactions, and the Assets Underlying the GIF Are Plan Assets 19

Defendants undisputedly violated their duties under 29 U.S.C. §§ 1106(a)-(b), which "categorically" bar transactions "likely to injure" the Plan. *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) (citation omitted).

A. Defendants Engaged in Prohibited Party-In-Interest Transactions Under 29 U.S.C. § 1106(a) 19

There is no dispute that the Defendants are all parties in interest, and that the Defendant fiduciaries caused the Plan to engage in prohibited transactions [redacted].

B. Defendants' Affirmative Defenses to the § 1106(a) Claim Fail Because They Cannot Show that the Plan Paid No More Than "Adequate Consideration" for the GIF, [redacted] 21

Defendants' asserted exemptions—the "Transition Policy" exemption under 29 C.F.R. § 2550.401c-1(b)(2) and the exemption for "contract[s] for… annuities" under 29 U.S.C. § 1108(b)(5), both require Defendants to prove that the Plan paid no more than "adequate consideration" for the Guaranteed Fund. As explained in detail below, Defendants cannot prove this. The "Transition Policy" exemption also requires Defendants to prove that Nationwide Life was "wholly owned" by the Plan sponsor, Nationwide Mutual. [redacted].

C. Defendants Cannot Prove "No More Than Adequate Consideration" Was Paid Where They Had No Process for Monitoring the Consideration to Nationwide Life During the Class Period 23

To prove "no more than adequate consideration" was paid, Defendants must show ***both*** that the plan paid no more than "fair market value" to Nationwide Life ***and*** that the process that led to the determination of fair market value complied with Defendants' fiduciary duties under 29 U.S.C. § 1104. *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 437 (6th Cir. 2002). Defendants cannot meet their burden of proving that the process of determining adequate consideration complied with their fiduciary duties. The BIC [redacted] The BIC also hindered its independent consultant, Callan, [redacted].

D. Nationwide Life Also Engaged in Prohibited Transactions Under 29 U.S.C. § 1106(b) 26

The assets underlying the GIF remained Plan assets [redacted] Nationwide Life [redacted], it was a functional fiduciary [redacted]

[redacted] therefore constituted a violation of § 1106(b)(1)—***regardless of whether the fees were reasonable***. *See Pipefitters Local 636 Insurance Fund v. Blue Cross & Blue Shield of Mich.*, 722 F.3d 861, 867-68 (6th Cir. 2013); *Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001).

II. The BIC and Nationwide Mutual Breached Their Fiduciary Duties Under 29 U.S.C. § 1104 29

The duties charged to an ERISA fiduciary are "the highest known to the law." *Gregg v. Transportation Workers of Am. Int'l*, 343 F.3d 833, 841 (6th Cir. 2003) (quoting *Chao,* 285 F.3d at 426). They include the duty of prudence and the duty to follow the "documents and instruments governing the Plan." *See* 29 U.S.C. §§ 1104(a)(1)(B), (D). ERISA also imposes on appointing fiduciaries the duty to monitor appointees to ensure their performance complies with ERISA and the plan documents. The BIC and Nationwide Mutual breached these obligations.

A. Defendants Were Fiduciaries 30

The BIC and its members were fiduciaries because they are charged with monitoring the Plan's investment options and expenses, including the GIF. Nationwide Mutual is a fiduciary because it appointed the BIC.

B. The BIC Violated Its Duty to Follow Plan Documents and Instruments 31

Section 14.05 of the 2019 Plan Document, which mirrors materially identical language in the 2013 Plan Document, states that "contract charges under the insurance contract related to the guaranteed investment fund" cannot be paid out of Plan assets[redacted]. The GIF's contract similarly states that "the Employers [e.g., Nationwide Mutual] shall make Expense Contributions to the Company for taxes paid and expenses incurred by the Company under the Contract"[redacted]. The BIC also violated ERISA by completely ignoring the Plan's investment policy statement. [redacted]. The BIC's total disregard of this document was a clear fiduciary breach.

C. The BIC Breached Its Duty of Prudence 34

Fiduciaries have a continuing duty to monitor Plan expenses to ensure they are not excessive. The BIC undisputedly violated this duty by failing to [redacted] monitor, the GIF's fees and expenses [redacted]. *See Chao*, 285 F.3d at 430 (fiduciaries must provide expert consultants "with complete and accurate information"). The BIC further violated its duty of prudence by (1) failing to monitor Nationwide Life's compliance with the GIF's contract, which called for Nationwide Life to provide an ***annual*** crediting rate guarantee; 2) allowing expenses to be charged against the Plan's GIF assets even though that did not comply with the GIF's Contract and Plan Documents; and 3) ignoring the Plan's investment policy statement. *See Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 358 n.7 (4th Cir. 2014) ("[C]ourts have found that a fiduciary's failure to act in accordance with plan documents serves as evidence of *imprudent* conduct—in addition to independently violating Subsection (D) of § 1104(a)(1).") (emphasis in original).

D. Nationwide Mutual Failed to Properly Monitor the BIC to Ensure Compliance with Plan Terms and Statutory Standards 38

Nationwide Mutual appointed the BIC, but failed to monitor the BIC to ensure that its performance complied with ERISA and the terms of the Plan as it was required to do. *See In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1047 (S.D. Ohio 2006); 29 C.F.R. § 2509.75-8, FR-17 (1976) ("At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in ***compliance with the terms of the plan and statutory standards***..." (emphasis added)). [redacted] is therefore liable for the BIC's fiduciary breaches.

CONCLUSION 38

Defendants are undisputably liable for Plaintiffs' claims under 29 U.S.C. §§ 1104 and 1106. The Court should enter summary judgment accordingly.

MOTION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs Ryan Sweeney and Bryan Marshall ("Plaintiffs") hereby move this Court for entry of an Order granting summary judgment against Defendants as to liability on Plaintiffs claims under 29 U.S.C. §§ 1104 and 1106. In support of this Motion, Plaintiffs rely on applicable law, their Memorandum below, the accompanying Declaration of Kai Richter and all exhibits thereto, the orders, pleadings, and filings in this case, 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

[redacted][1]

Defendants have a problem: during the class period, the investment fiduciaries on the BIC did ***not*** monitor the fees and other compensation received by Nationwide Life Insurance Company ("Nationwide Life") in connection with the Guaranteed Fund ("GIF"), an investment offered in the Nationwide Savings Plan ("NSP" or "Plan"). This simple fact—which is undisputed—is dispositive of liability on both Plaintiffs' breach of fiduciary duty claim and their prohibited transaction claims under the Employee Retirement Income Security Act ("ERISA").

From a fiduciary standpoint, the duty to monitor plan expenses and the compensation paid to plan service providers is one of the most fundamental functions of an ERISA plan fiduciary,[2] and is literally written into the text of the statute. *See* 29 U.S.C. § 1104(a)(1)(A)(ii) (fiduciaries must defray "reasonable" plan expenses). Yet, the BIC allowed Nationwide Life to [redacted] compensation from the Plan's investment in the GIF, with no questions asked.

For purposes of ERISA's prohibited transaction rules, monitoring Nationwide Life's compensation was also essential. Related-party transactions such as this are absolutely barred under 29 U.S.C. § 1106, unless Defendants can show an applicable exemption applies. The only

[1] [redacted] For purposes of this Memorandum, all cited exhibits are attached to the accompanying declaration of Kai Richter, and all cited deposition transcripts are included as Exhibits 59-64 to the Richter Declaration. Unless otherwise indicated, pin-cites to bates-numbered exhibits refer to the bates number of the relevant page, omitting the prefix and any leading zeroes.

[2] *See* Dep't of Labor, *Meeting Your Fiduciary Responsibilities* at 6 (Sept. 2021), *available at* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities-booklet-2021.pdf ("[T]he plan's fees and expenses should be monitored to determine whether they continue to be reasonable…."); *id.* at 12 ("If you are hiring third-party service providers, have you… considered whether the fees are reasonable for the services provided?").

exemptions Defendants have identified are 29 U.S.C. § 1108(b)(5), which requires that the compensation be "no more than adequate," and the so-called Transition Policy exemption in 29 C.F.R. § 2550.401c-1, which incorporates § 1108(b)(5)'s requirements by reference. *See* Order Denying Motion to Dismiss, ECF 67, at PageID 1170-71, 1175; 29 C.F.R. § 2550.401c-1(b)(2)(ii). Under binding Sixth Circuit law, "adequate consideration" requires that the Plan pay no more than "fair market value" to Nationwide Life ***and*** that the process that led to the determination of fair market value complied with Defendants' fiduciary duties. *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 437 (6th Cir. 2002). Although the first element of this test is a matter of dispute between the parties, Defendants undisputably cannot satisfy the second element, [redacted].

While this is a massive problem for Defendants' defense, it is by no means the only one. Defendants also disregarded several critical documents:

- **Failure to Follow Plan Document.** The Plan Document provides that "contract charges under the insurance contract related to the guaranteed investment fund" are ***not*** administrative expenses that may be paid out of Plan assets; instead, they are to be paid by Nationwide Mutual Insurance Company ("Nationwide Mutual") as Plan sponsor. Ex. 2, at 698; *see also* Ex. 3, at 832.[3] Thus, even if the BIC had monitored the compensation paid to Nationwide Life to ensure that it was no more than adequate—which it failed to do—the tab should have been picked up by Nationwide Mutual.

- **Failure to Follow IPS.** The Plan has an Investment Policy Statement ("IPS"), which calls for reviewing the fees and expenses of the investments in the Plan. Ex. 5. However, the BIC never reviewed it. Ex. 6, at 6.

- **Failure to Abide by the GIF Contract**. The contract underlying the GIF (hereinafter, the "Contract") provides for an *annual* guarantee, Ex. 4, at 150[redacted]

[3] The contract underlying the GIF similarly provides that "the Employers shall make Expense Contributions to the Company for… expenses incurred by the Company under the Contract." Ex. 4, at 150.

For all of these reasons and the reasons discussed more fully below, Plaintiffs respectfully request that the Court grant Plaintiffs partial summary judgment as to liability on their breach of fiduciary duty and prohibited transaction claims under 29 U.S.C. §§ 1104 and 1106.

BACKGROUND

I. The NSP and the Benefits Investment Committee ("BIC")

The NSP is a 401(k) deferred compensation plan sponsored by Nationwide Mutual for its employees and those of its affiliates, including Nationwide Life. ECF 87, at PageID 1299. As of December 31, 2022, the Plan had approximately $6.7 billion in assets and 43,777 participants, making it one of the largest 401(k) plans in the country. Ex. 7, at 2, 18.

The BIC "is responsible for the oversight of the investment of the Plan's assets, and, as such, is a fiduciary of the Plan." Ex. 2, at 692; Ex. 3, at 826. In connection with its fiduciary investment responsibilities, the BIC is also "responsible for carrying out the provisions of any applicable investment policy" and for "establish[ing] rules for the transaction of its business and for the implementation of any applicable investment policy." Ex. 2, at 692; Ex. 3, at 826. The Plan Documents further provide that the BIC "has the authority to obtain from the Plan Sponsor and [its] Employees such information as the [BIC] deems necessary to properly execute its duties under the Plan." Ex. 2, at 692; Ex. 3, at 826.

Internal company documents indicate that the BIC and its members are responsible for ensuring both that "plan assets are properly invested, and plan expenses are reasonable." Ex. 8, at 1833. [redacted]

[redacted]

Nationwide Mutual appoints the members of the BIC, all of whom must be "senior executives of the Plan Sponsor," through its Board of Directors. Ex. 2, at 635; Ex. 3, at 757-58. During the Class Period, the BIC's members included Defendants David Berson, David LaPaul, Kevin O'Brien, Klaus Diem, Michael Mahaffey, and Michael Leach.[4]

II. The Plan's Investment Policy Statement

The Plan has an "investment policy" statement ("IPS") dated January 19, 2006. *See* Ex. 5. The IPS was adopted in 2006 and has never been rescinded, revoked, or modified. Ex. 6, at 5-6. The stated purpose of the IPS is to "record the goals, policies and objectives" that the BIC has established, and to provide guidelines for the "periodic evaluation, or monitoring" of the Plan's investments, including an explanation as to how the BIC will "discharge its obligations to[] prudently select investment alternatives; periodically monitor and evaluate those alternatives; and

[4] The Class Period runs from March 26, 2014 through the date of final judgment in this action. ECF 120, at PageID 5813. [redacted]

based on such periodic evaluations, determine whether or not the alternatives will continue to be made available to the participants." Ex. 5, at 65606.

The IPS includes several investment guidelines for the Plan, including the following:

- Beginning in 2005, the BIC will reevaluate the entire Plan portfolio in every year divisible by 4. *Id.* at 65607.
- Criteria that the BIC shall use in the process of monitoring investments include "[t]otal expense levels that are reasonable and competitive." *Id.*
- When evaluating investment option performance, the BIC should "consider the reasonableness and effect of the costs, with preference being given to low-cost funds unless the additional cost can be justified by other factors." *Id.* at 65608.

The Plan document states that the BIC is responsible for carrying out the provisions of the IPS. Ex. 2, at 692; Ex. 3, at 826. However, Defendants ***admit*** that the IPS was not included in onboarding materials for BIC members and was disregarded by the BIC. Ex. 6, at 6.

III. The Guaranteed Fund

A. The Plan's Investment in the Guaranteed Fund

The GIF is one of the investments that the BIC has selected and retained for the Plan. ECF 71, at ¶ 48, PageID 1193. During the relevant period, tens of thousands of participants had their account assets invested in the GIF, with more than $2 billion invested in the Fund as of year-end 2021. Ex. 17, at 6.

The GIF's Contract is provided by Nationwide Life. Ex. 4. [redacted].

[redacted] "for the conduct of its routine business activities," such as salaries and rent. Ex. 21, at 7. As the Plan's independent investment consultant, Callan, has noted, this type of self-dealing is "uncommon in [a] 401(k) plan," and the GIF is "unique in that it is a guaranteed fund managed and guaranteed by an insurance company who is also the plan sponsor." Ex. 22, at 3926.

B. The GIF's Contract

The Contract does not list a guaranteed minimum interest rate, and the GIF had none. *See generally* Ex. 4; [redacted]. The interest rate is set by Nationwide Life entirely within its discretion. *See* Ex. 4, at 151 (Nationwide Life simply "declare[s]" the interest rate).

Whatever interest rate Nationwide Life chooses to declare must be set for an ***annual*** period in advance of each calendar year:

> 3.3 Interest Credits
>
> The Company will credit interest to the Deposit Fund at an effective annual rate equal to the guaranteed interest rate as declared by the Company.
>
> The Contractholder will be advised of the guaranteed annual interest rate in advance of each calendar year.

Ex. 4, at 151. [redacted].[5]

[5] There is no evidence that the "guaranteed annual interest rate" was ever provided to the BIC "in advance of each calendar year." Ex. 4, at 150. There also is no evidence that [redacted]

Under the GIF's Contract, Plan employers (i.e., Nationwide Mutual and its affiliates) are required to "make Expense Contributions to the Company [Nationwide Life] for taxes paid and expenses incurred by the Company under the Contract." Ex. 4, at 150. The Contract further provides that Nationwide Life "shall furnish all information which the Contractholder … may request at such times and in such manner as they may specify." *Id.* at 160.

C. The Plan Document

Echoing the notion that Plan participants are ***not*** responsible for paying the expenses associated with the GIF, the 2019 Plan Document governing the NSP states that "expenses… incurred in the administration of this Plan shall be paid from Plan assets," but contains an express exclusion which states that "expenses of administration of the Plan… do not include… contract charges under the insurance contract related to the guaranteed investment fund." Ex. 2, at 698. The language in the 2013 Plan Document is materially identical. Ex. 3, at 832 (stating that "expenses of administration of the Plan… do not include… contract charges under the Insurance Contract"). The 2019 Plan Document further clarifies that any expenses "not eligible to be paid by Plan assets," such as the GIF's charges, "shall be paid by the Plan Sponsor." Ex. 2, at 698.

D. The GIF's Crediting-Rate Methodology [redacted]

Nationwide[6] did not pay for the "contract charges under the insurance contract" or make "Expense Contributions… for taxes paid and expenses incurred by the company under the Contract." Ex. 4, at 150. [redacted].

Nationwide has stated that "[t]he process for determining the declared quarterly interest rate is described in the ERISA Section 401(c) Initial Disclosure [(hereinafter, the 'Disclosure')]

[6] "Nationwide" refers collectively to Nationwide Mutual and Nationwide Life.

made by Nationwide Life." ECF 87, at PageID 1299. This Disclosure states that the GIF's crediting rate is arrived at by [redacted] charges to compensate itself. Ex. 21, at 1-4. [redacted] is known in the industry as the "spread." Ex. 25, at 170. According to the Disclosure, [redacted] certain expenses that Nationwide Life pays itself, which are not limited to out-of-pocket costs and include "the costs of maintaining the… Fund, investment expenses, risk and profit charges, taxes, the cost of subsidizing interest rates for other contracts which are part of the same investment option… and the cost of maintaining adequate surplus to support the … Fund." Ex. 21, at 1.

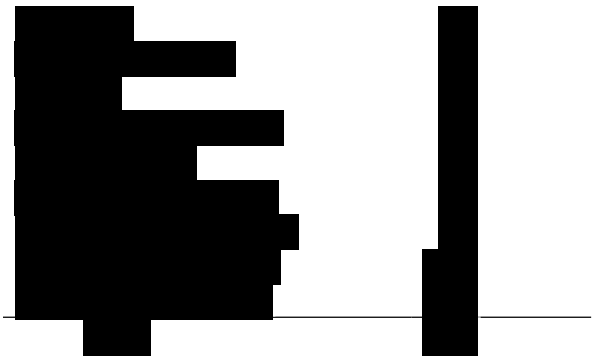
[redacted].

IV. The BIC's Failure to Monitor the GIF's Fees and Expenses During the Class Period

A. Callan's 2008 Analysis [redacted]

In 2008, [redacted]

[redacted]



Ex. 22, at 3926. Callan advised the BIC that, "at the current asset level top quality stable value management is available at lower fees." *Id.* at 3928. Callan further observed that the fee arrangement was "[redacted] as the current marketplace which is already priced for distress" and "[b]ased on normalized pricing… could be [redacted] than the available market." *Id.* at 3928.

[redacted]

[7] One basis point equals .01% of the total amount of assets invested (per year).

[redacted]

B. After Callan's 2008 Analysis, Defendants Shielded the GIF's Expenses from Further Review by Callan

After Callan's 2008 review of the GIF, there is no evidence the BIC made any attempt to perform any additional investigation into the propriety of the GIF's expenses for several years.

[8] [redacted]

Then, in 2016, the BIC engaged Callan to perform another review of the Plan's investment options. Ex. 32. The consulting contract stated that Callan would "[e]xamine [the] current guaranteed fund/stable value fixed annuity product," including its "[s]trengths & weaknesses" and the "[f]ee impact to participants." *Id.* at 5704. It also stated that the BIC would provide "all requested documents and data to Callan in a timely manner." *Id.* at 5706. But that did not happen.

In connection with Callan's review, Brianne Weymouth, a Senior Vice President at Callan, emailed Joseph Burke, Nationwide Mutual's Director of Benefits Planning, with "a few additional questions on the Guaranteed Fund that came out of our committee review." Ex. 33, at 1. One question was, "Is it possible to get the spread, or average spread declared across the company?" *Id.* Burke replied that there would likely be "difficulty getting some of the details." *Id.*

Defendants never provided Callan the requested information about the spread. Ex. 34. As a result, Callan stated in its 2017 presentation to the BIC that "[f]ees and/or spread are not available for review," and included the following disclaimer: "Importantly, fees are not reflected in this analysis.... Our analysis has no line of sight to the spread on the Guaranteed Fund[.] Fees are an important component of the analysis of any investment product." Ex. 35, at 2319, 2316. Callan also identified certain "Options to Consider" including that "the Plan could eliminate the Guaranteed fund." *Id.* at 2334.

History repeated itself in February 2020, a month before this lawsuit commenced. [redacted] Callan's representative Brianne Weymouth emailed Robert Watts—Nationwide's Associate Vice President of Benefits Planning—again requesting fee information regarding the Fund including its "spread,

or target spread, if available"' and "crediting rate formula, if any." Ex. 37, at 7821. But again, this information was not provided, and Callan drafted a "Guaranteed Fund Review" reiterating that (1) "[f]ees are an important component of the analysis of any investment product," (2) its "analysis has no line of sight to the spread on the Guaranteed Fund," and (3) "fees are not reflected in this analysis." Ex. 38, at 1275; [redacted]. In addition, Callan also prepared an "Investment Structure Evaluation" that recommended that the BIC "consider capping participants' contributions to the Guaranteed Fund" due to the Fund's lack of "fee transparency" and other factors. Ex. 39, at 1905. [redacted]

[redacted]

Soon thereafter, Callan's contract was amended "[t]o reflect the fact that the Nationwide Benefits Investment Committee does not wish to have [Callan] analyze or present any information with respect to the guaranteed fund investment option… or stable value alternatives available in the marketplace." Ex. 42. Notably, Defendants backdated this amendment, which was signed on April 6, 2021—***after*** Plaintiffs filed their complaint—to be effective November 21, 2019 (before the action was filed). *Id.*

Callan did eventually present a review of the Plan's investments to the BIC in 2021. [redacted] a footnote that Callan added to the presentation that stated, "Callan has been instructed that the Benefits Investment Committee has access to material and data relating to the guaranteed fund option not generally available to advisors like Callan, and therefore…this report does not offer analysis relating to such option or stable value alternatives." [redacted] Ex. 44, at 5568; [redacted].

C. [redacted]

[redacted] Nationwide's in-house and outside counsel were heavily involved in the presentation. See Ex. 46, at 2 (arguing that "drafts" of the presentation are privileged because they "reflect edits by lawyers Alan Stalnaker and outside litigation counsel"). This carefully curated

presentation was presented as a "Product Update," [redacted] Ex. 47; [redacted]

[redacted]

D. The BIC Failed to Monitor the GIF's Fees or Expenses

The BIC also failed to review the GIF's fees or expenses as part of its own ongoing monitoring process.

[redacted].

Moreover, the pertinent meeting minutes [redacted] states: "Keith provided an overview/refresher with respect to the guaranteed investment contract used to support the NSP's Guaranteed Fund and discussed… its historical performance/crediting rate(s) and its unique fee structure with respect to the NSP… ***The Committee discussed the performance***." [redacted] Ex. 50, at 005307.

[redacted]

[redacted]

V. Procedural History

On March 26, 2020, Plaintiffs Ryan Sweeney and Bryan Marshall ("Plaintiffs"), who were Plan participants invested in the GIF, brought this action on behalf of the Plan seeking to recover plan-wide relief under 29 U.S.C. §§ 1109(a) and 1132(a)(2). *See* ECF 1. In their operative Amended Complaint, Plaintiffs assert claims against Defendants for breaches of fiduciary duty under 29 U.S.C. § 1104; prohibited transactions under 29 U.S.C. §§ 1106(a)-(b); and violation of ERISA's anti-inurement provision, 29 U.S.C. § 1103(c). Am. Compl., ECF 34, ¶¶ 84-140.

Defendants moved to dismiss, arguing, among other things, that (1) the assets underlying the Fund are not Plan assets because the Disclosure establishes the GIF as a "Transition Policy"; and (2) Plaintiffs had not adequately pleaded a claim for breach of fiduciary duties; and (3) the affirmative defense under 29 U.S.C. § 1108(b)(5) shielded Defendants from liability for prohibited transactions. *See* ECF 41-1. However, the Court denied Defendants' motion to dismiss. First, regarding Defendant's Transition Policy defense, the Court noted Defendants "put the cart before the horse" in arguing that GIF assets are not "plan assets," because "[t]he safe harbor applies only if certain conditions are met"—including "adequate consideration" and other criteria of 29 U.S.C.

§ 1108(b)(5). ECF 67, PageID 1171, 1175. Second, the Court found Plaintiffs had "adequately allege[d] that Defendants' decisions were procedurally imprudent." *Id.* at 1174. The Court found support for an inference of fiduciary breach in Plaintiffs' allegation "that when the BIC hired Callan, an investment consultant, to provide fee benchmarking for the … Fund, they failed to provide the consultant all of the necessary information." *Id.* at 1174 & n.4. Finally, the Court held Defendants would need to provide evidence that "the plan pa[id] no more than adequate consideration" for the Fund to prove their affirmative defenses to Plaintiffs' prohibited transaction claims. *Id.* at 1175.

Defendants then moved for early summary judgment, based on their theory that they were not paid ***any*** consideration in connection with the GIF. ECF 87. Plaintiffs filed a motion to defer or deny summary judgment under Fed. R. Civ. P. 56(d) so that they could complete discovery—including discovery related to fee and expense compensation paid to Nationwide [redacted]. *See* ECF 98. On September 29, 2023, the Court denied Defendants' motion for summary judgment without prejudice, explaining that if, as Plaintiffs alleged, the GIF had hidden expenses [redacted], then "information related to payments from the Plan to Defendants" [redacted] is relevant to the "adequate consideration" inquiry. ECF 158, at PageID 6958. The Court also rejected Defendants' argument that only the crediting rate should inform the "adequate consideration" inquiry. As the Court explained, "Offering a high crediting rate compared to other plans does not signal that the Defendants were given 'no more than adequate consideration' for servicing the Plan because Defendants could have taken more consideration for themselves, even if they set the crediting rate equal to that of other plans." *Id.*

After issuing his Order denying summary judgment, the Hon. James L. Graham, who is on senior status, recused himself from the case, and the case was reassigned to the Hon. Sarah D. Morrison. Nevertheless, Judge Graham's Order remains the law of the case. *See Hayden v. Rhode Island*, 13 F. App'x 301, 302 (6th Cir. 2001); *Seals v. Wayne Cnty. Emps.' Ret. Sys.*, 2024 WL 81548, at *2 (E.D. Mich. Jan. 8, 2024) (holding previously assigned judge's rulings "are law of the case and will not be revisited by this Court, after reassignment of this case").

On March 28, 2024, the Court granted Plaintiffs' motion to certify the following class: "All participants and beneficiaries in the Nationwide Savings Plan who were invested in the Guaranteed Fund at any time from March 26, 2014 through the date of final judgment in this action, excluding the individual Defendants." ECF 172 at PageID 6999. Fact discovery closed on April 10, 2024, *see* ECF 168, and expert discovery closed on October 9, 2024, *see* ECF 180. Accordingly, this case is now ripe for consideration of summary judgment.

ARGUMENT

"ERISA is a complex statute, but its purpose is simple: to establish a 'uniform regulatory regime' for plan administration that protects monies belonging to plan beneficiaries while such funds are held and managed by others." *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 434 (6th Cir. 2019). To achieve its goals, Congress established "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans," 29 U.S.C. § 1001(b); *see also id.* § 1104, and imposed prohibitions on self-dealing by fiduciaries and other conflicted parties, *see id.* § 1106. Defendants violated these standards and proscriptions here.

Two undisputed facts carry undeniable legal consequences for Defendants. First, Defendants did not monitor the GIF's fees or expenses, and the resulting consideration to Nationwide in connection with the GIF. Second, Defendants failed to ensure that the GIF was administered in accordance with the terms of the Contract and Plan Document, which required

Nationwide to pay the GIF's expenses and provide an annual crediting rate guarantee. These undisputed facts mean: (1) Defendants cannot prove that "no more than adequate consideration" was paid for the GIF to meet their burden of establishing their § 1108(b)(5) affirmative defense to Plaintiffs' prohibited-transaction claims; (2) the Contract is not a "Transition Policy"; (3) the assets invested [redacted] were Plan assets; and (4) Defendants breached their fiduciary duties. Plaintiffs are thus entitled to summary judgment as to liability on their ERISA claims under 29 U.S.C. §§ 1104 and 1106.

I. Defendants Engaged in Prohibited Transactions, and the Assets Underlying the GIF Are Plan Assets

Sections 406(a) and (b) of ERISA [29 U.S.C. § 1106(a)-(b)] are designed to "categorically" bar certain transactions "likely to injure the pension plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) (citation omitted). These prohibitions are aimed at rooting out conflicts of interest and preventing self-dealing. *Chesemore v. All. Holdings, Inc.*, 886 F. Supp. 2d 1007, 1055 (W.D. Wis. 2012); *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43, 143 n.10 (1985). Defendants undisputedly violated both §§ 406(a) and 406(b).

A. Defendants Engaged in Prohibited Party-In-Interest Transactions Under 29 U.S.C. § 1106(a)

Section 406(a) of ERISA bans transactions between the Plan and "part[ies] in interest" to the Plan. *See* 29 U.S.C. § 1106(a). Under § 406(a), "[e]xcept as provided in [29 U.S.C. § 1108]," a plan fiduciary cannot cause the plan to engage in any "direct or indirect… sale or exchange, or leasing, of any property between the plan and a party in interest;… furnishing of goods, services, or facilities between the plan and a party in interest;" or "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." *Id.* § 1106(a)(1)(A), (C), (D). Here, there is no dispute that all of the Defendants, including Nationwide Life, were "parties in interest" and that the Plan engaged in subject transactions with Nationwide Life in connection with the GIF. [redacted]

[redacted].

Party In Interest. A "party in interest" includes, among others: (A) "any fiduciary (including, but not limited to, any administrator[)]… of such employee benefit plan," or an "employee of such employee benefit plan"; (B) "a person providing services to such plan," (C) "an employer any of whose employees are covered by such plan," and (G) "a corporation… 50 percent or more of [which] is owned directly or indirectly, or held by" another party in interest. 29 U.S.C. § 1002(14)(A)-(C), (G).

Nationwide Mutual is a party in interest because it is both the Plan sponsor and a Plan employer. Ex. 2, at 639, 643; Ex. 3, at 763, 767, 768. It is also a party in interest because its Board of Directors, acting in their capacity as Board members, appoints and oversees the members of the BIC (all of whom are high-level Nationwide Mutual employees), which is a fiduciary function. *See infra* at 30-31, 38.

Nationwide Life is a party-in-interest because, among other things, [redacted]. In addition, Nationwide Life is a party in interest because it is a fiduciary of the Plan [redacted]. *See infra* at 21-22 (citing Supreme Court decision in *Harris Trust*).

Finally, the BIC and its members were the designated investment fiduciaries under the Plan, *see supra* at 3 & *infra* at 30, and as such, parties in interest. Additionally, the BIC members were also parties in interest by virtue of their status as employees in the Plan.

Prohibited Transactions. There is no question that the Plan's transactions with Nationwide Life fall within the definition of prohibited transactions under ERISA § 406(a). [redacted] were prohibited party-in-interest transactions under 29 U.S.C. § 1106(a)(1)(A) and (D). Further, [redacted] also constituted prohibited party-in-interest transactions under 29 U.S.C. § 1106(a)(1)(B).

B. Defendants' Affirmative Defenses to the § 1106(a) Claim Fail Because They Cannot Show that the Plan Paid No More Than "Adequate Consideration" for the GIF, [redacted]

Defendants bear the burden of proving that an otherwise prohibited transaction falls within one of ERISA's exemptions. *See, e.g.*, *Sec'y of DOL v. United Transp. Union*, 2020 WL 1611789, at *12 (N.D. Ohio Mar. 30, 2020); *Horn v. McQueen*, 215 F. Supp. 2d 867, 876 (W.D. Ky. 2002). To date, Defendants have asserted that the GIF is exempt under ERISA § 408(b)(5), 29 U.S.C. § 1108(b)(5), an exemption specific to insurance annuity contracts, and under 29 C.F.R. § 2550.401c-1, which is known as the "Transition Policy" exemption.

The Transition Policy regulation governs whether the underlying assets [redacted] constitute "plan assets." 29 C.F.R. § 2550.401c-1. Absent such an exemption, they are Plan assets because "a plan's deposits are not shielded from the reach of ERISA's fiduciary prescriptions solely by virtue of their placement in an insurer's general account." *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank* ("*Harris Trust*"), 510 U.S. 86, 101 (1993); *see also*

Midwest Cmty. Health Serv., Inc. v. Am. United Life Ins. Co., 255 F.3d 374, 378 (7th Cir. 2001) ("*Harris Trust*… found that… assets held in an insurer's general account could be considered plan assets…."). [redacted]

Defendants have produced no evidence that an "independent plan fiduciary," which is not "an affiliate of the insurer issuing the policy," expressly authorized the acquisition or purchase of the policy underlying the GIF. *See* 29 C.F.R. § 2550.401c-1(b)(1). Accordingly, the Contract would only constitute a Transition Policy [redacted] if both of the following criteria are met: "(i) [t]he insurer is the employer maintaining the plan, or a party in interest which is wholly owned by the employer maintaining the plan," ***and*** "(ii) the requirements of section 408(b)(5) of the Act are met." *See* 29 C.F.R. § 2550.401c-1(b)(2). Here, Nationwide Life does not satisfy either criteria, let alone both.

Defendants fail to meet the first criteria [redacted]. *See supra* at 20.

Regardless, Defendants fail to meet the second criteria, satisfaction of ERISA § 408(b)(5) [29 U.S.C. § 1108(b)(5)]. Section 408(b)(5) states that the prohibitions in § 406(a) shall not apply to "[a]ny contract for… annuities… if the plan pays no more than adequate consideration." 29 U.S.C. § 1108(b)(5). As explained below, Defendants cannot make this showing here because they never monitored the compensation that Nationwide Life received. Thus, neither the Transition Policy exemption nor the exemption in § 1108(b)(5) (which is incorporated by reference into the Transition Policy exemption) save Defendants from Plaintiffs' prohibited transaction claims.

C. Defendants Cannot Prove "No More Than Adequate Consideration" Was Paid Where They Had No Process for Monitoring the Consideration to Nationwide Life During the Class Period

Defendants undisputedly failed to engage in a prudent process to determine whether the consideration paid in connection with the GIF was "no more than adequate." 29 U.S.C. § 1108(b)(5). Accordingly, they cannot meet their burden of proving this element.

In "the case of an asset other than a security for which there is a generally recognized market," adequate consideration means "the fair market value of the asset as determined in good faith by the trustee or named fiduciary." 29 U.S.C. § 1002(18). To prove "no more than adequate consideration" was paid, Defendants must show ***both*** that the plan paid no more than "fair market value" to Nationwide Life ***and*** that the process that led to the determination of fair market value complied with Defendants' fiduciary duties under 29 U.S.C. § 1104. *Chao*, 285 F.3d at 437.

With regard to process, "the degree to which a fiduciary makes an independent inquiry is critical." *Keach v. U.S. Tr. Co.*, 419 F.3d 626, 636 (7th Cir. 2005) (cleaned up). "[I]t is not enough that a fiduciary, by chance, arrived at fair market value…." *Chao*, 285 F.3d at 436-37; *accord Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996); *Brundle v. Wilmington Tr., N.A.*, 919 F.3d 763, 780 (4th Cir. 2019), *as amended* (Mar. 22, 2019). The "price paid by a hypothetical reasonable fiduciary is irrelevant," as is the question whether "a hypothetical reasonable fiduciary" would have arrived at the same result. *Chao*, 285 F.3d at 437. If "defendants did not make a good faith determination as to the price," then the definition of "adequate consideration" is not satisfied. *Id.* By failing to assess the consideration paid to Nationwide Life, as described below, the BIC did not make a good faith determination regarding the price or "fair market value" of the GIF.

First, like the trustees in *Chao*, [redacted]

[redacted] The BIC made no effort to investigate [redacted] even though (1) both the Contract and the Plan Document entitled them to that information, *see* Ex. 4, at 160; Ex. 2, at 692; Ex. 3, at 826; and (2) [redacted].

Second, the BIC not only failed to monitor the consideration that Nationwide Life received, but hindered Callan's efforts to do so during the relevant period. ***Prior*** to the Class Period, Callan was allowed to review the fees and expenses of the GIF, [redacted]. *See supra* at 8-9. However, ***during*** the Class Period, Nationwide and the BIC refused to provide Callan with any information about the GIF's fees and expenses, [redacted]. *See supra* at 11-13. This constituted a fundamental breakdown in the investment monitoring process, which the Supreme Court has held is a "continuing duty" that is ***not*** satisfied by a preliminary investment evaluation prior to the class period. *See Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015) ("This continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset."); *Karpik v. Huntington Bancshares, Inc.*, 2019 WL 7482134, at *4 (S.D. Ohio Sept. 26, 2019) ("Fiduciaries must review investments at 'regular intervals' and cannot assume that an investment that was proper initially 'will remain so indefinitely.'") (quoting *Tibble*). [redacted]

Here, as in *Chao*, the Plan's third-party expert (Callan) "was not given all of the information [it] needed to complete the valuation." 285 F.3d at 437. But Defendants' process here was even worse than in *Chao*. After Callan noted the lack of "fee transparency," and suggested potentially removing the GIF from the Plan or capping participants' contributions to the GIF, Defendants went so far as to remove the GIF from Callan's purview altogether (and ***backdated*** their amendments to Callan's contract), [redacted]. *See supra* at 12-13.

Third, [redacted]. *See supra* at 13-14.

Finally, this Court has already rejected Defendants' suggestion that simply reviewing the GIF's net crediting rate could constitute a good-faith determination that the consideration Nationwide Life received was "no more than adequate." *See* ECF 92, at PageID 2220-21 & n.7 (making this argument). As Judge Graham explained, even if Defendants could prove that Nationwide Life offered "a high crediting rate compared to other plans," that "does not signal that the Defendants were given 'no more than adequate consideration' for servicing the Plan because Defendants could have taken more consideration for themselves, even if they set the crediting rate

equal to that of other plans." ECF 158, at PageID 6958. So, merely reviewing the crediting rate is insufficient as a matter of law.[9]

In sum, Defendants cannot satisfy their burden under *Chao* to prove that the Plan paid no more than "adequate consideration" for the GIF, because they undisputedly lacked a process to monitor such compensation or determine whether it exceeded fair market value during the class period, and they interfered with Callan's own independent analysis. Accordingly: (1) the prohibited transaction exemption in § 1108(b)(5) does not apply; (2) the Transition Policy exemption does not apply; (3) the monies [redacted] are Plan assets; and (4) Defendants are liable for their prohibited transactions under 29 U.S.C. § 1106(a).

D. Nationwide Life Also Engaged in Prohibited Transactions Under 29 U.S.C. § 1106(b)

ERISA § 406(b) precludes self-dealing transactions between a fiduciary and the Plan. Under this provision, a fiduciary shall not "(1) deal with the assets of the plan in his own interest or for his own account," or "(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of a plan." *See* 29 U.S.C. §§ 1106(b)(1), (3). Notably, unlike § 406(a), § 406(b) contains an "absolute bar against self dealing," because an exemption listed in "[29 U.S.C.] § 1108 applies only to transactions under § 1106(a), not § 1106(b)." *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 750 (6th Cir. 2014); *see also Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 94 (3d Cir. 2012).

[9] Defendants' argument that the Plan paid ***no*** consideration for the GIF fares no better. The Court has already rejected Defendants' suggestion that [redacted] don't qualify as compensation or "consideration." ECF 158, at PageID 6958. If that were not enough, in their own reply in support of their Motion to Dismiss, Defendants described the "amounts Nationwide Life debits against the investment yield to determine crediting rates" as "compensation." ECF 55, at PageID 583. [redacted].

As noted above, Nationwide Life cannot establish its Transition Policy exemption, so the assets underlying the GIF remained Plan assets [redacted]. *See supra* at 21-22. Because the assets remained Plan assets, Nationwide Life was a fiduciary [redacted]. *See Harris Tr.*, 510 U.S. at 101 ("[A] plan's deposits are not shielded from the reach of ERISA's fiduciary prescriptions solely by virtue of their placement in an insurer's general account."); *Golden Star, Inc. v. Mass Mut. Life Ins. Co.*, 22 F. Supp. 3d 72, 81-83 (D. Mass. 2014) (insurer who retains discretion to set and deduct its own fees from plan assets is a functional fiduciary); *see also* [redacted].

In analogous cases, Courts have found that insurers are fiduciaries. For example, in *Pipefitters Local 636 Insurance Fund v. Blue Cross & Blue Shield of Michigan*, the Sixth Circuit held that where the insurer "necessarily had discretion in the way it collected" compensation for itself because the contract (like the GIF Contract here) did not set forth a specific method for calculating the fee, it was therefore an ERISA fiduciary in making fee-related decisions. 722 F.3d 861, 867 (6th Cir. 2013). Similarly, in *Golden Star*, the court held that an insurer who provided a group annuity contract to an ERISA plan was a functional fiduciary where, as here, the contract gave it control over "factors that determine the actual amount of its compensation." 22 F. Supp. 3d at 81 (quoting *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987)).

The same logic applies to Nationwide Life. The Contract does not put any limitation on Nationwide Life's ability to set its own fees. *See supra* at 6-8. [redacted]

[redacted].

Since Nationwide Life was a fiduciary [redacted] constituted a violation of § 1106(b)(1). Nationwide Life, a fiduciary, was [redacted] dealing with the assets of the plan in its own interest and for its own account. *See, e.g.*, *Solis v. Hartmann*, 2012 WL 3779050, at *7 (N.D. Ill. Aug. 31, 2012) (explaining that fiduciary violated § 406(b)(1) when he retained employee contributions in his company's general account, resulting in financial gain to the company). "[W]hen a 'fiduciary uses a plan's funds for its own purposes, ... such a fiduciary is liable under … § 1106(b)(1).'" *Hi-Lex*, 751 F.3d at 751 (citing *Pipefitters*, 733 F.3d at 867-69) [redacted] also violates § 1106(b)(3), because Nationwide Life—a fiduciary—was "receiv[ing] … consideration for [its] own personal account … in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(3).

The Sixth Circuit's decision in *Pipefitters* is on point. In that case, an insurer who was a plan fiduciary passed along a fee charged by the State of Michigan to plan participants by "discretionarily" charging them for the fees as incurred—which was not required but also not prohibited under the contract. *Pipefitters*, 722 F.3d at 868. The Sixth Circuit held that this "ran afoul of" ERISA's "prohibition against self-dealing under § 1106(b)(1)." *Id.* By extension, this would constitute a violation of (b)(3) as well.[10] The Ninth Circuit's decision in *Patelco Credit*

[10] The difference between (b)(1) and (b)(3)—"deal[ing] with the assets of the plan" vs. "receiving" consideration "in connection with a transaction involving the assets of a plan"—is a difference without meaning as applied to Nationwide Life. By [redacted]

Union v. Sahni, 262 F.3d 897 (9th Cir. 2001), is also instructive. In that case, an ERISA plan fiduciary "marked up" insurance premiums he charged to the plan with an administrative fee which he set and collected according to what he determined to be "reasonable." *Id.* at 911. The Ninth Circuit held that this conduct violated 29 U.S.C. §§ 1106(b)(1) and (b)(3), ***regardless of whether the fees were "reasonable."*** *Id.* The Sixth Circuit has cited *Patelco* favorably. *See Pipefitters*, 722 F.3d at 867-68. Here, as in both *Pipefitters* and *Patelco*, a plan fiduciary [redacted] plan assets. Thus, Nationwide Life violated §§ 1106(b)(1) and (b)(3) in the same way as the defendants in *Pipefitters* and *Patelco*.

II. The BIC and Nationwide Mutual Breached Their Fiduciary Duties Under 29 U.S.C. § 1104

In addition to violating ERISA's prohibited transaction provisions, the BIC and Nationwide Mutual also breached their fiduciary duties under 29 U.S.C. § 1104.

"[T]he duties charged to an ERISA fiduciary are 'the highest known to the law.'" *Gregg v. Transp. Workers of Am. Int'l*, 343 F.3d 833, 841 (6th Cir. 2003) (quoting *Chao,* 285 F.3d at 426). These duties involve several components. *Id.* at 840. One is the duty of prudence, which is "an unwavering duty to act both as a prudent person would act in a similar situation and with single-minded devotion to those same plan participants and beneficiaries." *Id.* (quotations removed); *see also* 29 U.S.C. § 1104(a)(1)(B). Another requires ERISA fiduciaries to act "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(A)(1)(D).

As explained below, the BIC failed to satisfy these fiduciary duties on account of its failure to prudently monitor the GIF's expenses and failure to ensure adherence to the Plan Document, IPS, and Contract terms. As an appointing fiduciary with oversight of the BIC, Nationwide Mutual

[redacted] Nationwide Life was both "deal[ing]" with Plan assets and "receiv[ing]" consideration therefrom.

is also responsible for these fiduciary breaches. *See In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1047 (S.D. Ohio 2006); 29 C.F.R. § 2509.75-8, FR-17 (1976) ("At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in ***compliance with the terms of the plan and statutory standards***...." (emphasis added)).

A. Defendants Were Fiduciaries

ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). A person or entity is a fiduciary to the extent they "exercise[] discretionary authority or discretionary control respecting the management of [an ERISA] plan," "exercise[] any authority or control respecting the management or disposition of its assets," or have "any discretionary authority or discretionary responsibility in the administration of such plan." *Guardsmark, Inc. v. BlueCross & BlueShield of Tenn.*, 169 F. Supp. 2d 794, 799 (W.D. Tenn. 2001) (quoting 29 U.S.C. § 1002(21)(A)). A person is also a fiduciary if they are a "named fiduciary" in the plan document. *See* 29 U.S.C. § 1102(a)(1).

The relevant Defendants here were fiduciaries. The BIC and its members were fiduciaries because the BIC is designated as such in the Plan Document and charged with monitoring the Plan's investment options and expenses, including the GIF. Ex. 2, at 692; Ex. 3, at 826; Ex. 8, at 1833. Because Nationwide Mutual appointed the BIC, Ex. 2, at 635; Ex. 3, at 757-58, it is also a fiduciary. *See In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d at 1047; *In re AEP ERISA Litig.,* 327 F.Supp.2d 812, 832 (S.D. Ohio 2004) (citing *In re Xcel Energy, Inc., Secs., Derivative, & "ERISA" Litig.,* 312 F.Supp.2d 1165, 1176 (D. Minn. 2004) ("A person with discretionary authority to appoint, maintain and remove plan fiduciaries is himself deemed a fiduciary with respect to the exercise of that authority. Implicit in the fiduciary duties attaching to persons empowered to appoint and remove plan fiduciaries is the duty to monitor appointees."); *Elec. Data*

Sys. Corp. "ERISA" Litig., 305 F.Supp.2d 658, 670 (E.D. Tex. 2004) ("ERISA law imposes a duty to monitor appointees on fiduciaries with appointment power.")).[11]

B. The BIC Violated Its Duty to Follow Plan Documents and Instruments

ERISA requires fiduciaries to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with" ERISA. 29 U.S.C. § 1104(a)(1)(D). The BIC breached this basic duty by failing to follow both the Plan Document and the Plan's IPS.

1. Section 14.05 of the Plan

Section 14.05 of the 2019 Plan Document (which mirrors materially identical language in the 2013 Plan Document) states that "expenses… incurred in the administration of this Plan shall be paid from Plan assets," but contains an express exclusion which states that "expenses of administration of the Plan… do not include… contract charges under the insurance contract related to the guaranteed investment fund." Ex. 2, at 698; *see also* Ex. 3, at 832. Under a plain-language reading of this provision, [redacted] are undoubtedly "contract charges under the insurance contract related to the guaranteed investment fund"; [redacted]. The 2019 Plan Document further clarifies that any expenses "not eligible to be paid by Plan assets," such as the GIF's charges, "shall be paid by the Plan

[11] Nationwide Life is also a fiduciary with respect to [redacted] the GIF's underlying assets. *See supra* at 27-28. The Supreme Court's decision in *Harris Trust* confirms this. However, Plaintiffs do not assert a breach of fiduciary duty claim against Nationwide Life in their Amended Complaint, only prohibited transaction claims and an anti-inurement claim. *See* ECF 26.

Sponsor." Ex. 2, at 698. These provisions clearly shift the costs of paying the GIF's charges "under the insurance contract" to Nationwide Mutual, which was identified in both the 2013 and 2019 Plan Documents as the "Plan Sponsor" and "Plan Employer." Ex. 2, at 639, 643; Ex. 3, at 757-58, 763, 767.[12]

Courts apply "traditional methods of contract interpretation" to determine the meaning of plan documents. *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1005 (6th Cir. 1993). In case there was any question about the plain meaning of this Plan provision (which there is not), the relevant contract here—i.e., the Contract establishing the GIF—confirms the above interpretation. *See J&R Passmore, LLC v. Rice Drilling D, LLC*, 2020 WL 6054298, at *4 (S.D. Ohio Oct. 14, 2020) (explaining that, in a dispute over contract interpretation, "other contracts with similar language are highly relevant"). The Contract states that "the Employers shall make Expense Contributions to the Company for taxes paid and expenses incurred by the Company under the Contract." Ex. 4, at 150. The term "Employer" is defined to include "any organization making contributions to the Plan, some or all of whose employees are covered under the Plan," which would clearly encompass Nationwide Mutual. *Id.* at 148. The term "Expense Contributions" is not otherwise defined in the Contract, but [redacted]. Thus, the plain language of this provision evinces a clear intent that Plan employers—rather than Plan participants—pay for the expenses incurred by the Company under the Contract. Even if the Contract were ambiguous (which it is not), it would be interpreted in favor of the policyholder. *See King v. Nationwide Ins. Co.*, 519 N.E.2d 1380, 1383 (Ohio 1988) ("[I]t is well-settled that, where provisions of a contract of

[12] Any other interpretation would insert ambiguity where there is none and undermine the purpose of ERISA § 404(a)(1)(D) [29 U.S.C. § 1104(a)(1)(D)]: to "allow[] the parties to be certain of their rights and obligations." *Hendon v. E.I. Dupont De Nemours & Co.*, 145 F.3d 1331 (6th Cir. 1998); *see also McMillan v. Parrott*, 913 F.2d 310, 312 (6th Cir.), *on reh'g,* 922 F.2d 841 (6th Cir. 1990).

insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured.").

Here, it is undisputed that [redacted] there is no genuine dispute that the BIC breached its duty to follow Section 14.05 of the Plan Document.

2. Investment Policy Statement

The BIC also violated ERISA § 404(a)(1)(D) by ignoring the Plan's IPS. Under applicable law, an investment policy statement is considered a document or instrument governing the Plan, which must be followed unless its terms are inconsistent with ERISA. *See* 29 C.F.R. § 2509.2016-01 ("Statements of investment policy … would be part of the 'documents and instruments governing the plan' within the meaning of ERISA section 404(a)(1)(D). An investment manager to whom such investment policy applies would be required to comply with such policy, pursuant to ERISA section 404(a)(1)(D) insofar as the policy directives or guidelines are consistent with titles I and IV of ERISA."); *Cal. Ironworkers Field Pension Tr. v. Loomis Sayles & Co.*, 259 F.3d 1036, 1042 (9th Cir. 2001) ("Fiduciaries who are responsible for plan investments governed by ERISA must comply with the plan's written statements of investment policy, insofar as those written statements are consistent with the provisions of ERISA."); *Alco Indus., Inc. v. Wachovia Corp.*, 527 F. Supp. 2d 399, 404 (E.D. Pa. 2007) ("Investment strategy policies are typically considered 'plan documents' that investment managers must follow in exercising their discretion.").

Here, Defendants ***admit*** that the IPS has never been rescinded or revoked, Ex. 6, at 5-6, [redacted]. The Plan document expressly provides that the BIC is responsible for carrying out the provisions of the IPS. Ex. 2, at 692; Ex. 3, at 826. Yet, the BIC treated it as if it were inoperative. *See supra* at 5 (citing Ex. 6, at 6). [redacted] The BIC's total disregard of the IPS was a clear fiduciary breach.

C. The BIC Breached Its Duty of Prudence

In addition to failing to abide by governing Plan documents, the BIC also failed to satisfy its duty of prudence. Pursuant to ERISA § 404(a)(1)(B), fiduciaries must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). This includes both a "duty to exercise prudence in selecting investments" and a "continuing duty to monitor [those] investments" and take appropriate action when necessary. *Tibble*, 575 U.S. at 529.

In evaluating whether this standard has been met, courts focus not on the merits of a fiduciary's actions in retrospect, but "on whether the fiduciary engaged in a reasoned decision[-]making *process*, consistent with that of a prudent man acting in [a] like capacity." *Pfeil v. State St. Bank & Tr. Co.*, 806 F.3d 377, 384 (6th Cir. 2015) (alteration in original) (quoting *Tatum v. RJR Pension Inv. Comm.,* 761 F.3d 346, 356 (4th Cir. 2014)). This inquiry "will necessarily be context specific." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). For the fiduciaries of a multi-billion dollar plan such as the NSP, the standard is high: prudence is "measured against hypothetical sophisticated and prudent investment professionals," not mere

laypersons. *In re Meridian Funds Grp. Sec. & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 917 F. Supp. 2d 231, 240 (S.D.N.Y. 2013).

Although fiduciaries may not have a duty to scour the market for the lowest-cost fund, they do "have a continuing duty to monitor their expenses to make sure that they are not excessive with respect to the services received." *Hughes v. Nw. Univ.*, 63 F.4th 615, 625 (7th Cir. 2023) (citations omitted); *see also* 29 U.S.C. § 1104(a)(1)(A)(ii) (imposing a duty to "defray[] reasonable expenses of administering the Plan"); *Allison v. L Brands, Inc.*, 2021 WL 4224729, at *10 (S.D. Ohio Sept. 16, 2021); *Garcia v. Alticor, Inc.*, 2021 WL 5537520, at *9 (W.D. Mich. Aug. 9, 2021); *supra* at n.2 (citing DOL guidebook on "Meeting Your Fiduciary Responsibilities"). "Implicit in a trustee's fiduciary duties is a duty to be cost-conscious." Restatement (Third) of Trusts § 88 cmt. a (2007). "Wasting beneficiaries' money is imprudent. In devising and implementing strategies for the investment and management of trust assets, trustees are obliged to minimize costs." *Davis v. Magna Int'l of Am.*, Inc., 2023 WL 3821807, at *3 (E.D. Mich. June 5, 2023) (quoting *Tibble v. Edison Int'l*, 843 F.3d 1187, 1198 (9th Cir. 2016) (en banc)).

With these principles in mind, the BIC undisputably violated its duty of prudence in multiple respects, as described below.

Failure to Monitor Fees and Expenses. The BIC utterly failed to [redacted] monitor them. Analyzing this information to ensure Plan participants' retirement savings were not being wasted was crucial to fulfilling the BIC's fiduciary duties. *See, e.g.*, *Davis*, Inc., 2023 WL 3821807, at *3. [redacted]

[redacted]

The BIC's failure to provide Callan with fee and expense information was also imprudent. When fiduciaries utilize an expert consultant, they must "provide the expert with complete and accurate information." *Chao*, 285 F.3d at 430. The BIC failed to do so, even though it had agreed to provide Callan with "all requested documents and data." Ex. 32, at 5706. ERISA's duty of prudence "requires fiduciaries to review the data a consultant gathers, to assess its significance and to supplement it where necessary." *Gregg*, 33 F.3d at 843 (quoting *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 435-36 (3d Cir. 1996)). The BIC did not fulfill its duty "to supplement" the missing information; to the contrary, it retroactively amended Callan's contract to prevent it from reviewing the GIF or the fees and expenses of the Fund. *See supra* at 13.

The Plan had a contractual right to expense information related to the GIF, but there is no evidence the BIC ever attempted to exercise that right or obtain that information. *See* Ex. 2, at 692; Ex. 3, at 826; Ex. 4, at 160. "[F]iduciaries cannot shut their eyes to readily available information." *Myers v. Prudential Ins. Co. of Am.*, 2009 WL 10709793, at *5 (E.D. Tenn. Dec. 17, 2009).

Failure to Monitor Compliance with the GIF Contract. The BIC also breached its duty of prudence by failing to ensure that the Plan received the benefit of its bargain under the GIF Contract. [redacted]

[redacted]

[redacted] Section 3.3 of the Contract called for Nationwide Life to provide an ***annual*** crediting rate guarantee. *See* Ex. 4, at 150. [redacted]

[redacted] Section 2.2 of the Contract echoed the Plan Document in providing that Nationwide—not the Plan—would pay the GIF's expenses. *See supra* at 7, 32. [redacted]

Ignoring the Plan Document and IPS. Finally (at least for purposes of this motion[13]), the BIC breached its duty of prudence by failing to ensure compliance with the Plan Document and the Plan's IPS as discussed above. *See supra* at § II.B. "[C]ourts have found that a fiduciary's failure to act in accordance with plan documents serves as evidence of *imprudent* conduct—in addition to independently violating Subsection (D) of § 1104(a)(1)." *Tatum,* 761 F.3d at 358 n.7

[13] This motion focuses on fiduciary breaches that are clearly undisputed. Plaintiffs in no way suggest that these are the *only* ways in which Defendants breached their fiduciary duties.

(emphasis in original) (citing *Dardaganis v. Grace Cap. Inc.*, 889 F.2d 1237, 1241 (2d Cir. 1989)); *see also Piacente v. Int'l Union of Bricklayers & Allied Craftworkers*, 2015 WL 5730095, at *23 (S.D.N.Y. Sept. 30, 2015). This Court should do the same. As the Fourth Circuit explained in *Tatum*, "plan terms, and the fiduciary's lack of compliance with those terms, inform a court's inquiry as to how a prudent fiduciary would act under the circumstances." 761 F.3d at 367 n.16.

D. Nationwide Mutual Failed to Properly Monitor the BIC to Ensure Compliance with Plan Terms and Statutory Standards

As noted above, Nationwide Mutual, as an appointing fiduciary, had a duty to monitor the BIC to ensure that its performance was "in compliance with the terms of the plan and statutory standards." *See In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d at 1047; 29 C.F.R. § 2509.75-8, FR-17. That obviously did not happen here. [redacted]. Accordingly, it is also liable for the fiduciary breaches outlined above.

CONCLUSION

For the foregoing reasons, Defendants are undisputably liable for Plaintiffs' claims under 29 U.S.C. §§ 1104 and 1106. The Court should enter summary judgment accordingly.

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