EFiled: Oct 28 2014 10:58AM EDT
Filing ID 56254820
Case Number 441,2014 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NATIONWIDE EMERGING MANAGERS, LLC, Defendant/Counter-Plaintiff/ Third-Party Plaintiff Below-Appellant, and NATIONWIDE CORPORATION, and NATIONWIDE MUTUAL INSURANCE CO., Defendants Below-Appellants, v. NORTHPOINTE HOLDINGS, LLC, Plaintiff/Counter-Defendant Below-Appellee, and NORTHPOINTE CAPITAL, LLC, PETER CAHILL, MARY, CHAMPAGNE ROBERT GLISE, MICHAEL HAYDEN, JEFFREY PETHERICK, STEPHEN ROBERTS and CARL WILK, Third-Party Defendants Below-Appellees.	:	No. 441, 2014 On Appeal From The Superior Court Court C.A. No. N09C-11-141-ALR

APPELLEES' ANSWERING BRIEF

YOUNG & ASSOCIATES

Rodger D. Young, *admitted pro hac vice*
Jaye Quadrozzi, *admitted pro hac vice*
27725 Stansbury Blvd, Suite 125
Farmington Hills, MI 48334
248.353.8620
248.479.7828 (facsimile)
efiling@youngpc.com

DALTON & ASSOCIATES, P.A.

Bartholomew J. Dalton (No. 808)
1106 W. 10th Street
Wilmington, Delaware 19806
302.652.2050
BDalton@BDaltonlaw.com

Attorneys for:
NorthPointe Holdings, LLC,
Plaintiff/Counter-Defendant Below-Appellee; and
NorthPointe Capital LLC, Peter Cahill, Mary Champagne, Robert Glise, Michael Hayden, Jeffrey Petherick, Stephen Roberts, and Carl Wilk,
Third-Party Defendants Below-Appellees

Dated: October 28, 2014

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(cont.)

Page

TABLE OF CONTENTS
(cont.)

Page

TABLE OF CONTENTS
(cont.)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

(cont.)

Page(s)

TABLE OF AUTHORITIES
(cont.)

Page(s)

Other Authorities

NATURE OF THE PROCEEDINGS

After a two week non-jury trial, the Superior Court issued a 61-page Opinion finding that Defendant/Appellant Nationwide breached the parties' contract and the attendant implied covenant of good faith and fair dealing, and awarding Plaintiff/Appellee NorthPointe[1] damages in excess of ten million dollars. The trial court's well-reasoned Opinion should be affirmed.

From 1999 until 2007, Nationwide and NorthPointe Capital (a Michigan mutual fund management company) "partnered" together to manage mutual funds for Nationwide investors. In July 2007, Nationwide sold its 65% interest in NorthPointe Capital to another NorthPointe entity for $25 million. The parties' Purchase Agreement ("PA") contained a carefully-negotiated benefit: NorthPointe would continue to manage ("sub-advise") seven specific mutual funds for Nationwide for three years after the sale. Nationwide agreed not to replace NorthPointe as the sub-advisor on the NVIT Mid Cap Growth Fund (the largest of the funds) or terminate NorthPointe as sub-adviser on any of the other six funds.

Yet while the parties were negotiating the terms of the PA, Nationwide was secretly working to create a new mutual fund to compete directly in the same market with the largest of the seven funds, the huge NorthPointe-managed NVIT

[1] The trial court accurately detailed the relationship among the NorthPointe parties. Op. 1-2. The distinctions are not relevant to the issues on appeal.

fund. In March 2008 (only six months after the parties closed on their sale) Nationwide opened its new fund to its investors. Nationwide also placed an artificially low cap on its fund's management fees to attract investors away from the NorthPointe-managed fund. Then, on July 1, 2008, Nationwide unilaterally withdrew $260 million from the NorthPointe-managed NVIT fund (more than half of the fund's total assets) and funneled $135 million of it directly into Nationwide's competing fund. Finally, in February, 2009 Nationwide merged what was left of the ravaged NorthPointe-managed NVIT fund into Nationwide's competing fund, incredibly claiming that *NorthPointe* caused the precipitous decline in the volume of fund assets.

In December, 2008, Nationwide terminated four of the other funds managed by NorthPointe (and later terminated a fifth fund). Despite the fact that key Nationwide managers admittedly never read the PA, they claimed (falsely) that the funds failed to satisfy the PA's Performance Standards. Thus, 14 months after the parties signed a PA in which NorthPointe paid $25 million for Nationwide's commitment that NorthPointe could sub-advise seven funds for at least three years, NorthPointe was advising only one small Nationwide fund.

NorthPointe filed suit in Superior Court in November 2009. Nationwide filed five dispositive motions before Judge Herlihy [A3 (1-22-10); A6 (3-15-10); A26 (1-4-12); A35 (12-21-12); A36 (12-21-12)]; its first three motions met with

mixed success; its fourth and fifth motions were denied in toto. Upon Judge Herlihy's retirement, the case was assigned to Judge Rocanelli.

From January 21- 31, 2014, Judge Rocanelli tried this case without a jury on NorthPointe's claims for breach of contract, breach of implied covenant of good faith and fair dealing, and fraud; and on Nationwide's counterclaim (breach of contract on a Promissory Note guaranteed by individual counter-defendants). On July 16, 2014, she issued a 61-page Decision After Trial ("Opinion" or "Op."), finding for NorthPointe on its contract/implied covenant claims and awarding net damages of $10,186,381.00. Op. 59-60. She rejected NorthPointe's fraud claim and Nationwide's breach of contract counterclaim.

On NorthPointe's breach of contract claim, the Court found that Nationwide breached the PA by:

(1) Failing to use the "NorthPointe" name on two funds for at least 18 months and failing to discuss sponsorship thereafter [Op. 24-25; 49];

(2) Removing assets from the huge NorthPointe-managed NVIT fund and thereby causing the fund's assets under management to drop below a critical amount stated in the PA [Op. 33, 48];

(3) Failing to pay NorthPointe termination fees required in the PA [Op. 47];

(4) Merging the NorthPointe-managed NVIT fund into the competing fund [Op. 48]; and

(5) Failing to satisfy marketing obligations [Op. 49-50].

The Court also found that Nationwide breached the implied covenant of good faith and fair dealing attendant to the PA, by:

(1) Setting the management fee structure for the new, competing fund at an artificially low level that prevented NorthPointe from effectively competing with the new fund [Op. 11, 12, 48];

(2) Failing to give proper notice to NorthPointe before terminating the four funds [Op. 35];

(3) Making the "disingenuous claim" that it was not obligated to pay termination fees to NorthPointe under §1(a) [Op. 23, 47]; and

(4) Removing $260 million from the NorthPointe-managed fund and reallocating it to other funds, including $135 million directly into Nationwide's new, competing fund [Op. 48].

Judge Rocanelli's Opinion contains extensive credibility findings. As to NorthPointe's witnesses, the Court made only positive credibility findings:

Cahill: [NorthPointe Chief Investment Officer. A1453]
"The Court accepts the testimony of Cahill as credible and reliable" Op. 22.

Glise: [NorthPointe Manager of Mid Cap Style Funds. B73]
"Glise was a consistent, credible witness." Op. 26.

Gardner: [NorthPointe CFO/Chief Compliance Officer. A1563]
"The Court accepts Gardner's analysis that NorthPointe met or exceeded the contractual performance standards." Op. 30.

Hayden: [NorthPointe CEO. B77]
"Hayden was a credible witness" Op. 50.

Grabel: [NorthPointe Director of Operations. B62]
"Grabel's testimony provided the Court with a perspective of the impact of Nationwide's breach of contract and breach of the implied covenant of good faith and fair dealing." Op. 52.

Simon: [NorthPointe financial accounting expert. A1576]
"The Court accepts Simon's analysis regarding the recalculation of the purchase price." Op. 57.

In stark contrast, the Court observed that "Nationwide witnesses were unreliable," [Op. 39]; "Nationwide's own witnesses contradicted and undermined its arguments" [Op. 38] and that "high turn-over in key positions at Nationwide resulted in institutional incompetence." [Op. 9]. "Other than Grady [no longer employed at Nationwide], the Nationwide witnesses were evasive and made efforts to shift blame and escape responsibility." Op. 38. Specifically, the Court found:

Grugeon: [Acting President of Nationwide Funds Group. B63]
"Grugeon's demeanor was defensive and suggested that he was very reluctant to testify. . . . The Court found that Grugeon was an evasive witness. He made every effort to avoid answering the questions posed to him" Op. 8, n.9.

Spangler: [President of Nationwide Funds Group. B85]
"Spangler was a reluctant and evasive witness. … Efforts to clarify details of his testimony were met with derision." Op. 8, n.11. "The Court rejects Spangler's testimony as unreliable." Op. 28, n.37.

Hallowell: [Nationwide Chief Investment Officer. A1627]
"The Court rejects Hallowell's testimony as inconsistent with the weight of the evidence to the contrary." Op. 13, n.13 (con'td).

Wetmore: [Chairman, Nationwide NVIT and Mutual Funds Board. Op. 9; B91]
"At best, Wetmore's attitude toward Nationwide's contractual obligations was cavalier; at worst, he was absolutely dismissive. Ultimately, his testimony is unreliable." Op. 40.

Hickey: [Nationwide V.P. Product/Sub-Advisory Management. B70]
"Hickey . . . claimed not to have known the terms and conditions of the Purchase Agreement." Op. 39. "Hickey's testimony undermined

Nationwide's claims. Hickey is a Nationwide employee who claims to have direct responsibility for the NorthPointe funds during the critical time period, yet he claims to have known nothing about the performance standards that NorthPointe was supposedly violating." Op. 40. "He was not a credible or reliable witness." Op. 40, n.51.

Meyers: [Chief Marketing Officer of Nationwide Funds. B97]
Like other Nationwide witnesses, Meyers denied responsibility for any decision-making that was salient to the issues before the court. * * * The Court absolutely rejects as incredible Meyers' claim that Nationwide was reluctant to market NorthPointe funds because of poor performance." Op. 50, n.69.

Marcus: [Nationwide economic expert. B98]
"David Marcus, contradicted Nationwide's argument." Op. 17. "[T]he Court finds Marcus' analysis to be suspect. First he was disingenuous…. Second, he offered an expert opinion on valuation without speaking with anyone at Merrill Lynch on whose valuation the purchase price was negotiated. Third, he never had a conversation with anyone at Nationwide to discuss controlling documents." Op. 57, n.77(con'td).

"When factual findings are based on determinations regarding the credibility of witnesses, the deference already required by the clearly erroneous standard of appellate review is enhanced." *Olson v. Havorsen*, 986 A.2d 1150, 1157 (Del. 2009).

SUMMARY OF ARGUMENTS

I. "REFORMATION"

[A] Denied. The Court's finding that the phrase "Nationwide NVIT Mid Cap Growth Fund" was a typo and referred to the "Nationwide Mid Cap Growth Fund" in Schedule 1 was a reasonable interpretation of a latent ambiguity, not a "reformation."

[B] Denied. The Court's determination that the NorthPointe-managed NVIT fund was not subject to §1(a) was not error; this section is ambiguous and there was conflicting trial testimony over whether *both* §1(a) and §1(b) applied to the fund, or *only* §1(b) applied to it. The ruling is independently sustainable under the "forthright negotiator principle."

[C] Denied. Even if this Court concluded that §1(a) somehow included the NorthPointe-managed NVIT fund, Nationwide's *merger* of this fund into Nationwide's fund did not constitute a §1(a) "termination."

II. LAW OF THE CASE

Denied. The Court properly rejected Nationwide's "law of the case" argument. The prior ruling is not nearly as broad as Nationwide suggests.

III. IMPLIED COVENANT

Denied. The Court found four distinct breaches of the implied covenant of good faith and fair dealing attendant to the parties' PA.

[A] Nationwide did not address (and therefore waived any challenge to) the first aforementioned breach (timing of termination of funds in December 2008).

[B] There was no error in the Court's determination that Nationwide breached the implied covenant by "disingenuously assert[ing]" that NorthPointe failed to satisfy the Performance Standards. Nationwide's witnesses admitted they ignored the PA's Performance Standards (or had never even read them).

[C] The Court properly held that Nationwide's withdrawal of $260 million from NorthPointe's fund and funneling $135 million of it into Nationwide's competing fund violated the implied covenant. This is precisely the scenario that the implied covenant is designed to remedy. Nationwide's claim that it redeemed these funds simply because a financial advisor directed it to do so was incredible and the PA contained no exception permitting such action.

[D] The Court did not err in finding that Nationwide violated the implied covenant by imposing a limit on fees in its new competing fund that was 12-15 basis points lower than NorthPointe's fees, where this action was plainly intended to draw investors away from NorthPointe and into Nationwide's fund, and thereby undercut a key basis of the original transaction for NorthPointe.

IV. PERFORMANCE STANDARDS

Denied. The parties disagreed over interpretation of the specific Performance Standard requiring that each NorthPointe fund must not "have

performance rank in the bottom third of its peer group over a period of three consecutive years or five consecutive quarters" A1081 (PA, Ex. D, Schedule 2).

[A] The Court properly held that this Standard applies only to performance on a prospective (not retrospective) basis from the date of closing. This is the "plain meaning" of the phrase. Nationwide's construction would permit Nationwide to terminate only months after closing based on two years' worth of performance that occurred before closing; this defies logic and common sense.

[B] The Court properly found that Nationwide's claim that NorthPointe violated the Standards was an excuse to avoid paying termination fees for its business decisions and damages for its breach of contract.

[C] The Court did not err by permitting NorthPointe's industry experts to testify about interpretation of the Performance Standards. Delaware law permits expert testimony explaining industry terms and practices.

V. DAMAGES

Denied. The Court did not abuse its discretion in any aspect of its award of damages, or in its consideration of the expert opinion provided by NorthPointe's damages expert. Nationwide failed to present any countervailing damages evidence or analysis, and failed to preserve several of the damages issues that it attempts to assert on appeal.

STATEMENT OF FACTS[2]

I. PRE-2007: BACKGROUND

From 1999 until 2007, NorthPointe Capital managed various mutual funds on Nationwide's behalf that Nationwide offered to its investors. A1458-1459. By 2006, NorthPointe Capital sub-advised the seven funds at issue here. Nationwide owned 65% of NorthPointe Capital, an arrangement that was enormously profitable for Nationwide—it received about $15 million in profits between 1999 and 2007, a 1500% return on investment. A362; A1459. In 2007, key NorthPointe managers formed a second NorthPointe entity to purchase Nationwide's interest in NorthPointe Capital. This purchase is the fulcrum of this case.

For several months in early 2007, Nationwide and NorthPointe negotiated over the sale of Nationwide's interest. A364-366. Nationwide hired Merrill Lynch [A364] to conduct due diligence, and its report included two sets of financial projections for NorthPointe: one prepared by NorthPointe [A700], and one prepared by Merrill Lynch. A701; A1470; A766-773. See also A740-743, prepared by Merrill Lynch. B78. The Merrill Lynch projections formed part of the basis on which the transaction was valued. A1471; A766-773.

Merrill Lynch's independent report is important for two reasons. A740-743. First, it touts NorthPointe's "superior performance" compared to industry

[2] A critical 2-page linear timeline summarizing relevant facts was an exhibit to NorthPointe's brief opposing the fifth dispositive motion. B1.

benchmarks, addressing NorthPointe's "history of consistent investment results." A740-741; B78. Second, the report provides an objective view of NorthPointe's 2007 performance—which undercut Nationwide's claims at trial.

II. JULY 2007: THE PURCHASE AGREEMENT

On July 19, 2007, the parties executed the PA [A1016-1107] by which NorthPointe acquired all of Nationwide's shares for $25 million (cash and a subordinated Note). A366. On this date, one fund, the "crown jewel" Nationwide NVIT Mid Cap Growth Fund (the "NorthPointe-managed NVIT fund"), contained $439 million in assets under management ("AUM"); the AUM in the six remaining funds totaled $345 million. A363.

The appeal arises out of Exhibit D to the PA: four pages that memorialize the parties' agreements about the seven sub-advised funds. A1078-1081. Exhibit D contains five paragraphs and two schedules. Paragraph 1(a) contains Nationwide's agreement not to terminate NorthPointe's subadvisory agreements for a three-year period. A1078. Paragraph 1(b) addresses the pivotal NorthPointe-managed NVIT fund, and contains Nationwide's promise not to replace NorthPointe or engage a concurrent subadvisor such that thereafter NorthPointe would have less than $300 million in AUM in that fund. A1078.

Exhibit D's Paragraph 2 obligates Nationwide to conduct marketing campaigns on all seven funds [A1078-1079], and Paragraph 5 imposes obligations

related to the two funds that bore the "NorthPointe" name. A1079. Exhibit D's Schedule 1 identifies the seven specific sub-advised funds and contains formulas for calculating a "Termination Fee" for four funds. A1080. Schedule 2 contains the Performance Standards for the funds. A1081.

The parties closed on the PA on September 28, 2007. A363. On December 21, 2007, Nationwide sent letters to the shareholders of the seven NorthPointe-managed funds, assuring them that it only "selects subadviser(s) it believes will provide the Funds with high quality investment management services." A1140; B5. Nationwide glowingly endorsed NorthPointe's "portfolio managers' previous investment experience with the Funds" and "the performance of the experienced team of portfolio managers that would manage the Funds' assets." A1141; B6.[3]

III. MARCH 2008: NATIONWIDE OPENS ITS LONG-PLANNED COMPETING FUND AND CAPS ITS FEES TO ENTICE INVESTORS OUT OF THE NORTHPOINTE-MANAGED FUND

On March 25, 2008 (less than six months after closing) Nationwide launched a new fund: the NVIT Multi-Manager Mid Cap Growth Fund. A368. On May 1, 2008, Nationwide placed this fund on its variable annuity and variable life ("VA/VL") insurance menu of funds, offering it to Nationwide investors in direct competition with the NorthPointe-managed NVIT fund on that same menu. A368.

[3] Less than a year later, Nationwide claimed that NorthPointe was in violation of the Performance Standards in 2007: the very same period in which Nationwide had glowingly endorsed NorthPointe to its shareholders.

As Nationwide's Hickey acknowledged, the two funds competed "side-by-side" in the "same mid cap growth space." B71. Although Nationwide periodically created new funds, this particular fund not only competed directly with NorthPointe's fund, it also bore almost exactly the same name as the NorthPointe-managed NVIT Mid Cap Growth Fund. A1523.[4]

Unknown to NorthPointe, Nationwide had planned this fund long before the PA was executed. A May 15, 2006 internal Nationwide evaluation examined the massive NorthPointe-managed NVIT (then GVIT) Mid Cap Growth Fund, recommending that Nationwide manage this fund "in-house" because of its performance and amount of assets. A653, 660. By May or June of 2007, before the PA was executed, Nationwide secretly began creating its new fund [A1561] and on October 30, 2007, Nationwide sought the approval from its NVIT Board to file the initial SEC registration statement for the fund. A1112.

As a result of the parties' multi-year partnership, Nationwide knew NorthPointe's fee structure on its funds and how this amount factored into the amount NorthPointe agreed to pay for the sale. Nationwide therefore designed its new competing fund with a fee cap that was 12-15 basis points below the fees NorthPointe charged, [B64-65;B87] thereby guaranteeing better performance.

[4] Minutes of Nationwide's March 11, 2008, investment subcommittee meeting reveal that Nationwide was "Looking to reduce the number of funds and narrow the scope of the relationship with NorthPointe." A1158.

A1522; A1641. This meant that, once the new competing mid-cap growth fund opened, its fee structure undercut the fee rates that Nationwide knew NorthPointe was relying on.

IV. JULY 2008: NATIONWIDE MOVES MILLIONS OF DOLLARS OUT OF THE NORTHPOINTE-MANAGED NVIT FUND AND INTO ITS OWN COMPETING FUND

On July 1, 2008 (nine months after closing), Nationwide unilaterally removed approximately $260 million from the NorthPointe-managed NVIT fund. A368. This catastrophic act reduced the AUM in this fund to approximately $175 million—substantially below the $300-million floor contained in Exhibit D's §1(b). A368; A1529. The same day, Nationwide transferred approximately $135 million of this amount into its own NVIT fund. A369.

Nationwide insisted at trial that it moved these funds because its independent financial expert, Ibbotson, recommended it, and that Nationwide had a fiduciary duty to its shareholders to do so. Judge Rocanelli rejected the claim that Ibbotson directed Nationwide's actions, finding the claim "was not supported by any credible record evidence." Op. 36-37. Contrary to NWBr. 14, this finding is not clearly erroneous. Nationwide's Grugeon admitted that its Funds Board was obligated to use its business judgment to consider Ibbotson's recommendations [B66-67], and Nationwide's Spangler, not Ibbotson, made the final decision to move the funds. B86. See also B20 (Nationwide prospectus representing to the

SEC that it takes sole responsibility for the models selected by Ibbotson: Nationwide "will act as a fiduciary" and "if deemed necessary. . . [Nationwide] will update the models.") Finally, Nationwide never claimed in any of its contemporaneous communications to NorthPointe that it was taking this action because of any fiduciary duty. A1455.

V. SEPTEMBER-DECEMBER 2008: NATIONWIDE ACTIVATES ITS PLAN TO REMOVE NORTHPOINTE

In September 2008, only a year after the parties closed on the PA, an internal Nationwide memo reiterated Nationwide's long-held strategy: because "[b]oth NVIT funds are currently on the actively marketed VA and VL menus . . . removing the NP-managed version [is] critical." A1213.

On November 25, 2008, Nationwide's president finally revealed its plan to NorthPointe. A370. In a letter, he letter explained that Nationwide planned to recommend to its Fund Board "liquidation" of four of the seven NorthPointe-managed funds, by no later than April 30, 2009, due to the funds' purported failure to meet performance standards. A1217-1219.[5]

With regard to the large NorthPointe-managed NVIT fund, Nationwide did not recommend liquidation or termination; rather it recommended "a plan of reorganization pursuant to which the NVIT Mid Cap Growth Fund will merge into

[5] The letter claimed that it was "exploring various options" for a fifth fund (Nationwide Value Opportunities Fund), and made no recommendation about a sixth fund (Nationwide Large Cap Value Fund). A1220-1221.

the NVIT Multi-Manager Mid Cap Growth Fund." A1220. To justify this, Nationwide complained that NorthPointe's NVIT fund had "lost a substantial portion of its assets over the 12 months ended September 30, 2008, declining from $481 million to $149 million." A1220. Nationwide made no mention of the fact that $260 million of this decline was caused by Nationwide itself in one day. Instead, the sole reason cited was NorthPointe's alleged failure to meet Nationwide's "standards." A1219.

On December 3, 2008, Nationwide's Funds Boards approved these recommendations [A370], and within days Nationwide stopped accepting deposits into five NorthPointe-managed funds. A1526-1527. Specifically, 401(k) monies that several NorthPointe clients sought to deposit into these funds (under strict deposit timing requirements) were returned to the clients as "undeliverable" before NorthPointe could inform them of the change. This seriously damaged NorthPointe's reputation among its institutional investor clients, including the Hershey Company, San Francisco's Bay Area Rapid Transit System (BART), and the Wyoming Foundation, *inter alia*. A1526-1527; B60.[6]

[6] When investors in NorthPointe's other funds learned of Nationwide's actions, many hurriedly pulled their funds from NorthPointe management. (As more redemptions occur, a mutual fund gets smaller and more expensive for those who remain.) B60; A1566; B74.

VI. NATIONWIDE'S WITNESSES ADMIT THAT THEY IGNORED THE PA

Nationwide's witnesses admitted that they paid no attention to the terms of the July 2007 PA. Nationwide's acting president, Grugeon, admitted that he never read the entire PA until his deposition [B67], and that it "had nothing to do with the decision whether or not to maintain or to fire or to do whatever with NorthPointe as a subadvisor." B69. Hickey, Nationwide's Sub-Advisory Management V.P., recommended merging the two NVIT funds by "[l]eaving aside the contractual obligations arising out of the Nationwide-NorthPointe Capital transaction" [A1212]; he too admitted that he had never read the PA. B71-72.

VII. TRIAL

At trial, NorthPointe claimed that Nationwide breached the PA and the attendant implied covenant of good faith and fair dealing. Within 14 months after Nationwide accepted NorthPointe's $25 million for the right to sub-advise seven funds, Nationwide terminated four funds and merged the NorthPointe NVIT fund into Nationwide's competing fund, all based on Nationwide's view that the funds' performance failed Nationwide's performance standards.

NorthPointe alleged that Nationwide failed to properly interpret or apply the PA's Performance Standards. NorthPointe also presented evidence that the performance of all seven funds satisfied the Standards. Indeed, NorthPointe outperformed industry benchmarks from 2002 through 2011. B75.

With regard to the NVIT fund, NorthPointe alleged, *inter alia*, that Nationwide breached either the PA or the implied covenant by its surreptitious creation of a fund in direct competition with the NorthPointe-managed fund and imposition of a fee cap ensuring better performance; by transfer of assets out of the NorthPointe-managed fund into the competing fund (and thereby reducing AUM below $300 million); and by merging the two funds. A244-249; A470-473; A591-594. NorthPointe also alleged additional breaches of the PA relating to certain other funds. A240-244; A463-470. Nationwide's actions caused NorthPointe to lose the income stream that it bargained for, despite the PA's protections. A1534.

Nationwide claimed that it bore no liability because its acts were "permitted terminations" under Exhibit D, §1(a). Although it had previously maintained that its acts were based on the Performance Standards, at trial Nationwide claimed that its acts were taken to satisfy fiduciary obligations to its own shareholders, on the recommendation of its financial advisor (Ibbotson). Alternatively, Nationwide claimed that its liability could not exceed $3.5 million—the "termination fee" cap in Exhibit D's §1(a).[7]

[7] As NorthPointe asserted below, §1(a)'s contractual "termination fee cap" is not a limitation of damages clause. A235-236; A252-254; A492-493. No rational person would pay $25 million to acquire a company and agree to limit damages for all disputes of any type to $3.5 million. In addition, other clauses in the PA directly undercut NorthPointe's view that a termination fee cap could be construed as a limitation of damages clause. See, e.g., A1042 (PA §7.5: $9,000,000 "maximum indemnification"). Finally, note that the $3.5 termination fee cap applies (by its

In its Opinion, the trial court made the following key findings:

1. "When NorthPointe's performance is calculated prospectively using the calculations set forth in Exhibit D, NorthPointe met the performance standards." Op. 29

2. "Nationwide's litigation claims that NorthPointe violated the performance standards was a theory developed to avoid paying termination fees for its business decisions and damages for its breach of contract." Op. 32.

3. "The termination did trigger the required termination fees under Section 1(a) of Exhibit D because (1) Nationwide terminated four subadvised fund agreements; (2) the termination was NOT due to violation of performance standards OR because of Nationwide's responsibilities to its shareholders; and therefore, (3) the termination fees must be paid. Nationwide's failure to pay the termination fees due and owing, was a breach of contract. In addition, Nationwide's disingenuous claim that Nationwide was not obligated to compensate NorthPointe under Section 1(a) of Exhibit D was a breach of the duty of good faith and fair dealing." Op 47.

4. Nationwide breached the covenant of good faith and fair dealing by redeeming $260 million from the NorthPointe NVIT and relocating it to other funds, including $135 million into the competing Nationwide Multi-Managed NVIT." Op. 48. See also Op. 33.

5. Nationwide's actions violated the contract with respect to the NVIT. First, Nationwide redeemed assets and brought the fund under the critical AUM of $300 million … to $174 million. Op. 48.

---

own terms) only to disputes under §1(a); it has no conceivable application to a damages award for violation of §1(b) or for breach of the implied covenant.

ARGUMENT

I. THE SUPERIOR COURT DID NOT "REFORM" THE TERMINATION FEE PROVISION IN SCHEDULE 1. THE COURT PROPERLY INTERPRETED §1(A) AND §1(B)

A. Questions Presented

When the Court examined the "Termination Fee" provision of Schedule 1 to Exhibit D of the PA, it determined that the phrase "Nationwide NVIT Mid Cap Growth Fund" was a typographical error that referred to the "Nationwide Mid Cap Growth Fund." **[A]** Was this a "reformation" of the PA or a "permissible interpretation" of a latent ambiguity?[8] **[B]** Did the Court err by rejecting Nationwide's interpretation of §1(a)? *Preserved:* A452-456; A581-583. **[C]** In the alternative, is affirmance appropriate even if §1(a) is interpreted to apply to the NorthPointe NVIT fund? *Preserved:* A470-471; A583-584.

B. Standard Of Review

Contracting parties' intent is generally a question of fact. *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998). Although contract interpretation is reviewed *de novo*, *Riverbend Community, LLC v. Green Stone Engineering, LLC*, 55 A.3d 330, 334 (Del. 2012), accompanying factual

[8] Nationwide failed to preserve this issue: it made no objection when NorthPointe's Cahill testified that the NorthPointe-managed NVIT fund was erroneously included in Schedule 1, even when queried by the Court. A1526.

determinations will not be overturned unless clearly erroneous. *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1220 (Del. 2012).

C. Merits of the Arguments

1. The Court Did Not "Reform" The Parties' Agreement

The Superior Court's determination that the phrase "Nationwide NVIT Mid Cap Growth Fund" was a typo and referred to the "Nationwide Mid Cap Growth Fund" was a permissible interpretation of a latent ambiguity in the Termination Fee portion of Exhibit D's Schedule 1, not a "reformation" of it.

A contract that contains either a latent or patent ambiguity may be interpreted by the court. *In Matter of Estate of Gallion***,** 1996 WL 422338, *2 (Del. Ch. 1996). A patent ambiguity is one that appears on the face of the document, and "arises from the defective, obscure, or insensible language used." *Id.* quoting *Black's Law Dictionary*, (Rev. 4th Ed.). In contrast, a latent ambiguity does not appear from the face of the contract, but arises "where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings." *Id*. See also *Motors Liquidation Co., Dip Lenders Trust v. Allianz Ins. Co.*, 2013 WL 7095859, *4 (Del. Super. 2013).

Where a latent ambiguity exists, Delaware courts may consider extrinsic evidence. "A preliminary consideration of extrinsic evidence may be necessary to

determine whether this sort of hidden or latent ambiguity exists." *U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, *10 n.10 (Del. Ch.1996). "In some cases, determining whether a contract is susceptible to more than one interpretation requires an understanding of the context and business circumstances under which the language was negotiated; seemingly unequivocal language may become ambiguous when considered in conjunction with the context in which the negotiation and contracting occurred." *Id.* In such a situation, "[t]he Court may look to extrinsic evidence to reveal a latent ambiguity." *Motors Liquidation*, 2013 WL 7095859 at *4.

Consideration of extrinsic evidence can lead to an interpretation that is inconsistent with the plain language of the contract. *Motors Liquidation*, 2013 WL 7095859 at *5 ("extrinsic evidence regarding the negotiation process and course of performance will likely lead to a different result than merely relying on the policy language"). "[T]here is a small minority of cases where seemingly unequivocal language becomes reasonably susceptible to more than one meaning when considered in conjunction with the context in which the negotiation and contracting occurred." *Bell Atlantic Meridian Systems v. Octel Communications Corp.*, 1995 WL 707916, *6, n.5 (Del. Ch.1995).

Here, although "Nationwide NVIT Mid Cap Growth Fund" appears unambiguous on its face, the Court properly considered extrinsic evidence and

made credibility findings that established otherwise. Although the parties engaged in months of negotiations over the PA as a whole, the four pages constituting Exhibit D (relating to the specific funds) were not written until the weekend of July 4, 2007 [A1472], only two weeks before the July 19, 2007 execution.

During negotiations, the parties confused the names of these two funds. B80-81. In a critical internal e-mail exchange between the Nationwide executives in charge of negotiations, both improperly used "Mid Cap" when they obviously mean the "Mid Cap NVIT" fund [A944], a fact admitted by Nationwide's Grady. A1490. Both parties admitted that there were errors in this paragraph. See Nationwide's Grady [A1492-1493; B57]; and Hallowell [B90]; NorthPointe's Cahill [A1474-1475; A1526; A1553]; and Gardner [B59]. Indeed, the parties *stipulated* to the existence of an error in this paragraph [A387, ¶17] although Nationwide now tries to downplay this as a mere scrivener's error. NWBr, 20 n.3.

Crucially, Nationwide's November 25, 2008 letter [A1216-1221] reveals that *Nationwide* itself treated the "Termination Fee" clause in Schedule 1 as including the Nationwide Mid Cap Growth Fund, even though that fund was not expressly listed there. Specifically, in that letter Nationwide first stated that: (1) "each recommendation" it made therein was "deemed to be a 'Permitted Termination,' as defined in Section 1(a) of Exhibit D, as a result of NorthPointe's failure to have satisfied the Nationwide Standards," [A1218] and then among its

recommendations, it included (2) "liquidation of the Nationwide Mid Cap Growth Fund." A1219. If, as Nationwide now asserts, the parties did not consider the phrase "Nationwide NVIT Mid Cap Growth Fund" (as used in Schedule 1 at A1080) to mean "Nationwide Mid Cap Growth Fund" then Nationwide's letter makes no sense. There is no basis for a Termination Fee to be imposed on the Nationwide Mid Cap Growth Fund other than Schedule 1 of Exhibit D.

Finally, following a two week trial and considering all the evidence before it, the Court reached its interpretation, holding "The Court accepts the testimony of Cahill as credible and reliable that the NorthPointe NVIT should not have been listed on Schedule 1 to Exhibit D. Rather, the Nationwide Mid-Cap Growth Fund should have been included." Op. 22 n.32. The concerns addressed in *Brandywine Dev't Group v. Alpha Trust*, 2003 WL 241727, *6 (Del. Ch. 2003) (addressing a dispositive motion) are not present in the instant case.

2. The Court Did Not Err By Rejecting Nationwide's Interpretation of §1(b)

Nationwide argues here, as it did below, that "§1(b) did not 'carve out' from §1(a) a merger of the NorthPointe NVIT or any other actions Nationwide might take with respect to the fund; rather, §1(b) supplemented §1(a)." NWBr. 31. The Court properly rejected this restrictive interpretation of §1(b), which is a freestanding silo of rights and terms focused on the NorthPointe NVIT fund.

Nationwide's Cahill (who executed a $9 million personal guarantee to effectuate the sale), testified that §1(b) was a "free-standing section designed for the specific purpose of protecting the NVIT fund," and that it was not an afterthought in the negotiations. A1520. NorthPointe's Hayden testified that §1(b) was "central to [the] negotiations" and negotiated to "carve out" and "protect" the NorthPointe-managed NVIT fund. B84. The Court expressly found that: "[b]ased on the record evidence and the findings of fact, the Court concludes that Section 1(b) of Exhibit D applies to the NorthPointe NVIT." Op. 56. See also Op. 23 ("[§]1(b) of Exhibit D set forth the terms and conditions to protect NorthPointe's interests in the NorthPointe NVIT.")

The Court's finding that §1(b) governs the NorthPointe-managed NVIT fund is also fully supported under the forthright negotiator principle.[9]

[9] Where "examination of the extrinsic evidence does not lead to an obvious, objectively reasonable conclusion, the Court may apply the forthright negotiator principle." *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 835-836 (Del. Ch. 2007): "Under this principle, the Court considers the evidence of what one party *subjectively* 'believed the obligation to be, coupled with evidence that the other party knew or should have known of such belief.'" Thus, "where the extrinsic evidence does not lead to a single, commonly held understanding of a contract's meaning, a court may consider the subjective understanding of one party that has been objectively manifested and is known or should be known by the other party." *Id.*

3. The Court Did Not Err By Rejecting Nationwide's Interpretation of §1(a)

Nationwide attempts to focus on §1(a) alone, claiming that this provision is unambiguous because NorthPointe never offered a "reasonable competing interpretation of the PA that gives meaning to §1(a)." NWBr. 31. False. Even a cursory review of §1(a) reveals its ambiguity [A1078], and NorthPointe has indeed asserted its interpretation that §1(a) prohibits Nationwide from acting to terminate the sub-advisory agreements unless the provisions for termination are satisfied, i.e. Schedule 2, *inter alia*. A439, A248, A253. See also A467.

Nationwide asserts that a "merger" would fall within §1(a) because it "would necessarily involve NorthPointe's termination as a subadvisor." NWBr. 32. Wrong. The terms "merger" and "termination" have distinct meanings in the mutual fund industry. NorthPointe's Cahill testified that, "[w]ith a termination, the fund advisor can fire the sub-advisor unilaterally. With a merger, the fund advisor needs shareholder approval." A1456. Nationwide's Grady reluctantly agreed. A1491 ("most [of the] time boards have the right to unilaterally terminate without shareholder approval, but typically a merger requires shareholder approval. It changes the nature of the investment.")[10]

[10] Nationwide's assumption is also improper where other parts of Exhibit D contain specific terms with similar, but not identical meanings, and the consequences are not the same. See §1(a)("terminate" and "termination"); §1(b) ("replace" or "engage a concurrent sub-adviser"); §1(c)("not redeem shares"); (§4)

4. Alternatively, Even If §1(a) were Interpreted To Include the NVIT Fund, Nationwide's Merger Did Not "Terminate" The Sub-Advisory Agreement on That Fund

Even if this Court were to hold that the transactions relating to the NorthPointe NVIT fund should be examined under §1(a), affirmance is still proper. Nationwide's merger of this fund did not, in fact, "terminate" any sub-advisory *agreement* between the parties. A1078.[11] The subadvisory agreement does not recognize *de facto* termination, and that agreement was fully integrated. A826.

If Nationwide genuinely intended its actions toward the NorthPointe NVIT fund to trigger §1(a)'s "termination" provisions, it should have plainly so stated in its November 25, 2008 letter by using the same terminology for its actions as it used to address each fund addressed therein.[12] It did not do so; it absolutely distinguished between "termination" and "merger" as did NorthPointe's witnesses.

("right to close [a fund]" and "fund closure") and §5 ("closure of the [fund])." A1078-79. Where there has been obvious care to use different words for different concepts, seemingly-similar words should not be interpreted interchangeably.

[11] In fact, the subadvisory agreement under which NorthPointe managed the NVIT fund permitted *termination* of that agreement in relevant part only on either: (1) vote of the majority of the Trust Board's trustees or (2) written notice of a breach of the subadvisory agreement. A823.

[12] That letter recommended "liquidation" of four funds [A1217, A1218, 1219, and A1219], but a "plan of reorganization" as to the NVIT Mid Cap Growth Fund, by which it would "merge into" Nationwide's fund. A1220. This is not a "termination."

II. "LAW OF THE CASE" IS NO BAR TO AFFIRMANCE

A. Question Presented

Did the Superior Court properly permit NorthPointe to try its breach of contract and implied covenant claims, despite a 2010 Opinion by Judge Herlihy dismissing certain claims in a now-superseded Complaint? Judge Rocanelli rejected Nationwide's "law of the case argument." Op. 4, n. 1. *Preserved*: B82.

B. Standard Of Review

De novo. *Cede & Co. v. Technicolor, Inc.* 884 A.2d 26, 36 (Del. 2005).

C. Merits of the Argument

"At the trial court level, the doctrine of the law of the case is little more than a management practice to permit logical progression toward judgment. Prejudgment orders remain interlocutory and can be reconsidered at any time." *In re CNX Gas Corp. Shareholders Litigation*, 2010 WL 2705147, *2 (Del. Ch. 2010). The "law of the case doctrine is not inflexible . . . it is not an *absolute* bar to reconsideration of a prior decision that is clearly wrong, produces an injustice or should be revisited because of changed circumstances." *Gannett Co., Inc. v. Kanaga***,** 750 A.2d 1174, 1181 (Del. 2000). Finally, the law of the case doctrine "applies only to those matters necessary to a given decision and those matters which were decided on the basis of a fully developed record. Where, as here, this

Court could not have envisioned the full factual posture of a particular claim, the prior ruling cannot be considered to be the law of the case." *Zirn v. VLI Corp.*, 681 A.2d 1050, 1062, n.7 (Del. 1996).

Here, Nationwide asks this Court to set aside a 61-page Opinion issued in 2014 after a two-week bench trial, based on language in a 2010 interlocutory opinion addressing a previous Complaint. There is no basis to do so.

The key here is to compare which specific actions each judge was looking at in its opinion. In the 2010 Opinion, Judge Herlihy focused on NorthPointe's claim in ¶61A of its Second Amended Complaint that Nationwide breached §1(b) by "replacing" NorthPointe as the fund advisor on the NorthPointe NVIT fund and substituting two multi-managers on the fund. A73. Judge Herlihy observed, "Defendants are alleged to have created a new fund identical . . . transferred a large amount of assts from the Mid Cap fund and agreed with NPC's competitors to sub-advise the new fund." A74. He found that these allegations were factually insufficient to plead a breach of §1(b). A74-75. Thus, Judge Herlihy was focused on: (1) creation of the competing fund; (2) replacing NorthPointe; and (3) transferring assets.

In contrast, in her analysis of the §1(b) express breach claims, Judge Rocanelli looked at different factual allegations. She held that "Nationwide redeemed assets and brought the fund under the critical AUM of $300 million" and

"the merger of NorthPointe NVIT into the Multi-Managed NVIT . . . was in direct violation of Section 1(b)." Op. 48 She thus focused on: (1) bringing the AUM under $300 million by redeeming assets out of the fund; and (2) merging one fund into another. Judge Herlihy did not examine either of these allegations as potential breaches of §1(b).

Alternatively, even if this Court were to consider the 2010 ruling to be "law of the case" as to the Superior Court, the 2010 ruling would not constitute law of the case as to this Court, and therefore NorthPointe respectfully asks that this Court uphold the Judgment here.

The evidentiary record supports affirmance on the basis of either: an express breach under §1(b),[13] or a breach of the implied covenant of good faith and fair dealing.

[13] Judge Rocanelli made clear that the very detailed pretrial stipulated order governed the issues at trial. [B82 ("the pretrial stipulation does control")]. In the parties' Joint PreTrial Stipulation, the parties stipulated [A371] that:

> 61. The merger [of the two NVIT funds] divested [NorthPointe] of any further ability to subadvise the NVTI Mid Cap Growth Fund and earn revenue by doing so.

In addition, NorthPointe included the following [A378] under "Issues of Fact Remaining to be Litigated":

> 25. This transfer reduced the assets under NPC's management in the NVIT Mid Cap Growth Fund below $300 million—in fact, to approximately $175 million—in violation of Nationwide's obligations under Purchase Agreement Exhibit D §1(b) and the covenant of good faith and fair dealing implied therein.

III. THE COURT DID NOT ERR IN FINDING THAT NATIONWIDE BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. Question Presented

The Court held that Nationwide breached the implied covenant of good faith and fair dealing in four independent ways. [See *supra*, p. 4]. Nationwide challenges three of these grounds (failure to pay termination fees; removal of $260M from the NorthPointe fund; and the fee cap structure of the competing fund), waiving any challenge to the fourth ground (manner in which the four funds were terminated). *Preserved*: A462-463; A467-473; A591-594.

B. Standard Of Review

Whether specific conduct constitutes good faith is a mixed question of law and fact. *DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago,* 75 A.3d 101, 108 (Del. 2013); *Corrado Bros., Inc. v. Twin City Fire Ins. Co.,* 562 A.2d 1188, 1192 (Del. 1989). Legal questions are reviewed *de novo*, *Anchor Motor*, 716 A.2d at 156; factual findings for clear error. *DV Realty*, 75 A.3d at 108.

C. Merits of the Argument

The implied covenant of good faith and fair dealing "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Dunlap v. State Farm Fire & Cas. Co.,* 878 A.2d 434, 442 (Del.

2005). The implied covenant "arises from fundamental notions of fairness. It is a judicial convention designed to protect the spirit of an agreement when, *without violating an express term of the agreement*, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain." *Superior Vision Svcs, Inc. v. Reliastar Life Ins. Co.*, 2006 WL 4782393 *6 (Del. Ch. 2006) (Emphasis in original). "Equity will not permit one to evade the law by dressing what is prohibited in substance in the form of that which is permissible." *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280 (Del. 2007).

1. Nationwide's Untimely Termination Of Four Funds

Judge Rocanelli made the following findings about Nationwide's termination of four NorthPointe funds in December, 2008 [Op. 35]:

> The timing of Nationwide's notice to NorthPointe was harmful to NorthPointe's interests and the interests of its institutional clients. The letter was sent late on a Friday afternoon, two days after the Board meeting, and after NorthPointe was closed for the day. In the meantime, and prior to notifying NorthPointe, Nationwide had already notified the SEC that these funds were being closed. As a result, NorthPointe's institutional clients could not make required deposits to their own accounts. * * * As noted below, the timing of Nationwide's actions and Nationwide's failure to give proper notice to NorthPointe was a breach of the implied covenant of good faith and fair dealing and interfered with the viability of NorthPointe's business.

Nationwide waived any right to contest this finding. See *Delaware Transit Corp. v. Amal'd Transit Union Local 842*, 34 A.3d 1064, 1068 n.4 (Del. 2011).

2. Nationwide's "Disingenuous" Claim That It Did Not Need To Pay Termination Fees

At NWBr. 38, Nationwide misstates the Court's precise ruling. The Court did not find that the same conduct constituted both a contract breach and a breach of the implied covenant. Rather, it held that Nationwide's *failure to pay* the §1(a) termination fee was a contract breach [Op. 47], and that Nationwide's "*disingenuous claim***"** that it was not obligated to do so was a breach of the implied covenant. Op. 47 (Emphasis added). Thus, not making payment was the contract breach; the trumped-up attempt to excuse its behavior was the breach of the implied covenant.

As to the merits, the fact that the parties argued differing interpretations of the Performance Standards does not mean that the Court erred by finding that Nationwide's conduct was arbitrary or unreasonable. Abundant evidence supported the Court's implicit finding that Nationwide's position on termination fees was arbitrary and unreasonable (i.e. "disingenuous"). For example, although Nationwide claimed at trial that NorthPointe failed to meet the performance standards, Nationwide's own witnesses admitted that they paid no attention to the terms of the Performance Standards contained in the PA. See e.g., B69 (Grugeon: "the contract had nothing to do with the decision whether or not to maintain or to fire or to do whatever with NorthPointe as a subadvisor"); B92 (Funds Board Chairman Wetmore: "whatever contract that existed between the sub-advisor and

advisor regarding performance guarantees would have little impact on what we do").

Furthermore, Nationwide's November 25, 2008 letter announcing its intent to terminate four funds plainly supports the finding that its position on termination fees was arbitrary and unreasonable. Although Nationwide *articulated* the correct Standard at the beginning of that letter [A1217], the actual analysis in the letter shows that Nationwide did not *apply* this Standard to at least three funds. That is, Nationwide made no reference to either "three consecutive years" or "five consecutive quarters" when addressing the actual performance of the Nationwide Mid Cap Growth Fund [A1217-1218], the NorthPointe Small Cap Growth Fund [A1218-1219], or the NorthPointe Small Cap Value Fund [A1219]. Instead, Nationwide addressed how each fund performed under *Nationwide's internal* performance tests and determined that liquidation was necessary.

The Court's ruling was also supported by what this letter *does not* state: it makes no reference to any fiduciary obligation. Despite Nationwide's repeated claim at trial that its fiduciary obligations to its shareholders required it to take various actions [see e.g., B93], Nationwide's claim that it acted to fulfill fiduciary obligations is not mentioned in this letter, and was in fact never mentioned until after the lawsuit commenced. A1455.

3. Removing $260 Million From The NorthPointe-Managed NVIT Fund

Again, Nationwide misstates the record. The Court did not hold that the same conduct was both a breach of contract and breach of the implied covenant. On one hand, the Court held that Nationwide's reduction of the assets in the NVIT fund below the $300-million contractual floor was an express breach of the PA. Op. 48. On the other hand, the Court held that "redeeming $260 million from the NorthPointe NVIT and reallocating it to other funds, including $135 million into the competing" fund that Nationwide designed with an attractive low fee structure, violated the implied covenant. Op. 48.

The Court properly held that redeeming $260 million from the NorthPointe fund breached the implied covenant. Op. 48. The PA's language supports a finding that the parties would have prohibited the withdrawal of funds and placing them into a competing fund as a step toward merger, had they thought about that possibility. The fact that the PA contained a specific exhibit addressing the sub-advised funds shows that the parties were acutely concerned about the management of these funds. Further, the fact that Exhibit D referenced "good faith" [§1(a)]; "commercially reasonable efforts" [§1(d), §3]; "reasonably cooperate" [§2]; providing "any information reasonably requested" [§4]; and "reasonable cooperation and assistance" [§4], all suggest that the parties intended their contract

to be based on good faith and commercial reasonableness. In addition, the PA included similar prohibitions for other similar possibilities. [B81, B84].

Nationwide claims that its $260 million redemption/$135 million transfer into its own competing fund cannot be considered arbitrary or unreasonable because Nationwide was obligated to follow the recommendations of its financial advisor (Ibbotson). The Court's credibility determinations undermine this argument. Op. 37 ("This assertion was not supported by any credible evidence. … Nationwide's argument with respect to its discretion to follow Ibbotson's recommendations also was inconsistent with the testimony of decision-makers at Nationwide.") Further, there is absolutely no language in the PA itself that excuses Nationwide from its obligations to NorthPointe if Nationwide acted at the direction of Ibbotson or any other third party.

4. <u>The Competing Fund's Fee Structure</u>

On the evidence before it, the Court did not err by holding that Nationwide breached the implied covenant by intentionally setting the fee structure of its competing fund at an artificially low level that prevented NorthPointe from competing. Op. 11-12, 48. From the parties' negotiations, Nationwide knew not only the amount of management fees that NorthPointe planned to charge on the various funds, but also the assumptions and reasons underlying the fee amounts. A1497. Yet Nationwide designed its competing fund with a management fee cap

that was roughly 12-15 basis points less than NorthPointe's NVIT fund [B87; B99], pegging the competing fee at only 0.83% until at least May 1, 2009. B45; B64-65.

NorthPointe's industry expert testified that "if you have two funds on a platform that are substantially similar but not identical . . . most customers are going to invest in the lowest fee fund." B87. Nationwide's opposing expert reluctantly agreed, conceding that a "roughly 12 point difference between the two funds" is "material." B99. Nationwide's Grugeon admitted that it is an advantage for a mutual fund to have an expense cap as opposed to having uncapped expenses, because prospective investors pay a lot of attention to a fund's expense ratio. B65. The Court did not err in finding that imposition of such a fee violated the implied covenant.

There is no legal bar to recognition of an implied covenant claim here. No reasonable businessperson would have anticipated that Nationwide would negotiate a $25 million sale including these seven sub-advised funds, then sabotage the performance of NorthPointe's huge NVIT fund by placing an expense cap on the new competing fund and moving monies from one fund to another, claiming that NorthPointe's performance was poor. This is precisely the factual scenario that the implied covenant is designed to address.

IV. THE COURT DID NOT ERR IN EITHER ITS INTERPRETATION OF THE PA'S PERFORMANCE STANDARDS, OR ITS DETERMINATION THAT NATIONWIDE'S FAILURE TO PAY TERMINATION FEES VIOLATED THE PA

A. Question Presented

Did the Court err in: (1) its interpretation of the fund Performance Standards in the PA or (2) its finding that NorthPointe satisfied the Standards and therefore that Nationwide owed termination fees to NorthPointe? *Preserved:* A452-456.

B. Standard Of Review

Contracting parties' intent is generally a question of fact. *Anchor Motor Freight*, 716 A.2d at 156. Although this Court reviews contract interpretation *de novo*, *Riverbend Community*, 55 A.3d at 334, accompanying factual determinations will not be overturned unless clearly erroneous. *Martin Marietta,* 68 A.3d at 1220.

C. Merits of the Argument

1. Conflicting Interpretations

Section 2 of Exhibit D of the PA contains Performance Standards for the NorthPointe-managed mutual funds. A pivotal dispute at trial was over the meaning of the fourth Standard: that each fund must not "have performance rank in the bottom third of its peer group over a period of three consecutive years or five consecutive quarters." A1081.

Nationwide interpreted the Standard to permit it to select any three-year period, to take the annual performance for each year, and then to average or annualize[14] those three numbers into a single number. A1476. If the resulting performance number was in the bottom third, then Nationwide believed that the fund failed this Standard. Using this interpretation, Nationwide terminated several funds on November 25, 2008 (only 14 months after closing), based on annualized fund performance for: October 1, 2005–Sept 30, 2006; October 1, 2006–Sept 30, 2007; and October 1, 2007–Sept 30, 2008. *This computation included two years' of fund performance data from before the September 28, 2007 closing.*

In the mutual fund industry, it is common to measure fund performance by a fund's annualized performance. A1546. See also B88 (industry standard is "average annual" or 'annualized average" not consecutive").

Here, however, NorthPointe witnesses testified that they negotiated for a completely different performance standard to govern the funds in the PA. A1476 ("We negotiated the very specific words to create a standard that would be very difficult to violate"). The Performance Standards in the PA were unique and did not exist elsewhere. 1477. NorthPointe thus asserted that the Performance Standards were not mutual fund industry standards, but rather the PA's

[14] "Annualization takes the total performance over the three-year period. . . . If you're up 60 percent over that three-year period, your annualized number would be 20 percent. So 20 percent annualized gets you to 60." A1476.

Performance Standards meant exactly what their plain words state: that (1) performance rank must be calculated for each consecutive year or quarter individually (without consideration of annualized returns), and that for each of the three separate years or quarters, the fund's performance must be in the bottom third [A455-456] and (2) calculation of fund returns must commence on or after the date of closing and may not include fund performance prior to that date. A452-455.

2. The Court's Findings

The Court construed the plain meaning of the Performance Standards and properly concluded that the Standards do not permit "annualizing":

> Five consecutive quarters means five quarters in a row and "three consecutive years" means three years in a row. Thus the Court finds that the specifically negotiated performance standards were not meant to be annualized, but rather on a consecutive quarterly or yearly basis.

Op. 28-29. The Court also held that the Standards are to be applied prospectively (not retrospectively) from the date of closing. Op. 29.

3. There Is No Error In This Record

"In a dispute involving contract interpretation, the court must first examine the entire agreement to determine whether the parties' intent can be discerned from the express words used."[15] Here, another section of the PA that references Exhibit

[15] *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003); *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

D sheds light on how the parties intended Exhibit D to be interpreted. Section 1.7 provides:

> Section 1.7 Termination Fees. Buyer shall have the right to receive from the Seller termination fees, . . . pursuant to the terms and subject to the conditions set forth in Exhibit D (the "Termination Fees"). Such *Exhibit D also sets forth certain post-closing* covenants of the Seller.

A1021 (Emphasis added). This description of Exhibit D as containing "post-closing obligations" strongly suggests that calculation of the Performance Standards in Exhibit D be based exclusively on post-closing data.

An interpretation of a contract which produces an absurd result or a result that no reasonable person would accept when entering the contract is an unreasonable interpretation. *Osborn ex rel. Osborn v. Kemp,* 991 A.2d 1153, 1160 (Del. 2010). Here, Nationwide's interpretation of the Performance Standards (which would consider data that pre-dates closing) leads to an absurd result. It defies logic that any Buyer would pay $25 million for the right to manage funds for three years under an agreement that permitted Seller to determine that Buyer had not been in compliance for two years *before* the closing date, and thereby divest Buyer of its fund management rights while Seller retains the $25 million.[16]

[16] Not surprisingly, NorthPointe's Cahill testified that NorthPointe would not have paid $25 million for an agreement that permitted Nationwide to terminate the day after closing upon the mere payment of a termination fee. A1520.

In contrast, NorthPointe's interpretation is both logical and consistent with industry practice. A1517 (Cahill: "in our business when a new contract is put into place, the performance clock starts on day one"); A1477-1478.

4. Expert Testimony

Again Nationwide misstates the record, claiming that the Court "*adopted* NorthPointe's expert opinions offered by Lawrence Simon and Richard Wermers as to the interpretation of the Standard and whether Nationwide violated it." NWBr. 43. (Emphasis added). Nothing in the Court's Opinion states that it "adopted" the expert opinion of Mssrs. Simon or Wermers. To the contrary, the Court specifically stated that it "assigns the plain meaning to the Purchase Agreement's words in Schedule 2 to Exhibit D."[17] Op. 28. Nationwide's attempt to manufacture this issue for appeal is specious; NorthPointe's experts were not expressing legal opinions about the duties or ramifications arising from the parties' contract.

Nationwide's challenge here is actually to the admission of expert testimony. NWBr. 43 ("[o]ver Nationwide's objection, the Court admitted. . . NorthPointe's

[17] In construing the Performance Standards, the Court did address the testimony of *fact* witnesses, including NorthPointe's Glise (a "consistent, credible witness" Op. 26); Nationwide's Hallowell (whose testimony was "inconsistent with the weight of the evidence to the contrary" Op. 13, n.13 (cont'd); 27); and Nationwide's Spangler (testimony rejected as "unreliable" Op. 28). It therefore apparently did not deem it necessary to address every draft of the PA that Nationwide introduced.

expert opinions.") Fatal to its challenge, however, is Nationwide's failure to identify *specific* testimony by either expert that Nationwide deems to be inadmissible,[18] and its failure to identify any prejudice resulting from the specific testimony admitted.

In any event, Delaware permits industry expert testimony including testimony explaining industry terms and practices. See, e.g., *Towerview LLC v. Cox Radio, Inc.*, 2013 WL 3316186, *7 n.46 (Del. Ch. 2013) (competing industry experts testified about interpretation of term "secular decline"); *CA, Inc. v. Ingres Corp.*, 2009 WL 4575009, *43 (Del. Ch. 2009) (relying on software industry expert's testimony about meaning of term "embedded"). This is the type of testimony offered here; there was no error.

[18] If Nationwide had identified specific testimony, this Court would examine the admissibility rulings only for an abuse of discretion. *Adams v. Aidoo*, 2012 WL 1408878, *17 (Del. 2012).

V. THE COURT DID NOT ABUSE ITS DISCRETION IN COMPUTING THE DAMAGES AWARD OR PERMITTING NORTHPOINTE'S DAMAGES EXPERT TO TESTIFY IN THIS BENCH TRIAL

A. Question Presented

Lawrence Simon, CPA, testified as NorthPointe's damages expert. Remarkably, Nationwide presented *no* damage analysis at trial; its damages expert was asked only to rebut the opinions asserted by Simon. Op. 56, n.77. On this record, did the Court abuse its discretion in computing damages awarded to NorthPointe? Preserved: A475-484; A486-488; A595. Nationwide *failed to preserve an objection* to the fact that Simon did not: (1) compute damages for each type of breach, either by covenant in the PA or by express v. implied breach [NWBr. 47-48]; (2) consider 2008 the market crash [NWBr. 49]; or (3) address separately the amount of termination fees for two specific funds [NWBr. 40].

B. Standard Of Review

A damages award is reviewed for an abuse of discretion. *Bhole, Inc. v. Shore Investments, Inc.*, 67 A.3d 444, 449 (Del. 2013).

C. Merits of the Argument

The Court's computation of the net damages award of $10,335,011.00 may be depicted visually as follows:

	[1]	**$13,472,528.00**	recovery of purchase price [Op. 57-58]
plus	[2]	**$605,785.00**	termination fees under Section 1(a) [Op. 57]
plus	[3]	**$1,659,993.00**	direct costs [Op. 58]
less	[4]	**$551,862.00**	property lease/office costs not proven [Op. 58]
	[5]	**$15,186,380.00**	gross damages
less	[6]	**$4,831,370.00**	revised note amount [Op. 58-59]
	[7]	**$10,335,011.00**	NET DAMAGES AWARD [Op. 60].

1. The Court Did Not Err By Calculating Damages Using A "Revised Note" Amount Rather Than The Full Nine Million Note

At NWBr. 45-46, Nationwide challenges the amount appearing at [6] in the chart above: the recomputed promissory note amount of $4,831,370.00 rather than the entire $9 million note that NorthPointe executed in favor of Nationwide on September 28, 2007. A366. However, Nationwide sets forth no basis for subtracting the value of the entire note from the gross amount of damages.

Part of the damages model that NorthPointe's Simon used (and which Nationwide did not counter with any evidence) assumed that NorthPointe paid more for the purchase than the transaction was worth, and that damages should be computed based on a "re-calculation" of a more accurate value of the transaction. A1578, 1580, 1582. Simon opined that the total damages NorthPointe suffered were based first on an amount representing recovery of the purchase price of $13,472,528 [A1578-1582]; plus termination fees of $605,785 [A1579]; and additional out of pocket costs of $1,659,993. A1579. See also A1362, 1376 (relevant portions of Simon's expert report).

Simon further testified that the amount of the $9 million note was also properly reduced by the amount of overpayment, "so the new Nationwide note under the express contract breach should be 4 million 831,370 (sic)." A1595. He was clear that, whether the Court found an express or an implied breach of contract, the overpayment amount on the note was the same. A1595.

Thus, NorthPointe's expert recognized the need to (and did in fact) reduce the gross amount of damages to account for the existence of the note. There was no error in the Court's computation.

2. The Court Did Not Abuse Its Discretion By Awarding Damages In Accordance With the Damages Models Placed In Evidence By NorthPointe's Damages Expert

Nationwide raises four additional challenges to various aspects of the Court's damages findings.

Nationwide first claims that the Court erred by "adopting" Simon's damages opinion, because Simon assumed the existence of certain breaches that the Court did not find. There is no merit to this allegation. (Again, the Court did not expressly "adopt" any of Simon's models.) NorthPointe's Simon testified at length about three alternative damages models premised on varying findings that the Court could reach. A1578-1596. Due to the complexity of the various components of damages to be considered, NorthPointe took the unusual step of introducing its damages expert's report into evidence (without objection) in this bench trial.

A1352-1428; A1576. Both Simon's testimony and his report set forth individual components of injury suffered, so that the Court could correlate specific categories of damages to the factual findings that it made. (Indeed, the fact that the Court subtracted from Simon's analysis a single category of damages as unproven demonstrates the Court's grasp of the fact that Simon's opinions contained different components.) Nationwide has demonstrated no abuse of discretion in the Court's consideration of Simon's analysis.

Second, Nationwide claims that Simon made a factual assumption in the course of reaching his opinion that is false. Nationwide is wrong. Simon never concluded that "Merrill Lynch *valued* the NorthPointe enterprise at $25 million." NWBr. 48. (Emphasis added). Rather, Simon's report stated that the $25 million purchase price was "determined through the Merrill Lynch cash flow projections." A1376. See also A1581 (p 94:3-14). During cross-examination, Simon stated the same thing. A1601.

Further, Nationwide has not pointed to anything in the record demonstrating that Simon's opinion (that the $25 million purchase price was determined through the Merrill Lynch cash flow projections) was, in fact, false. Finally, even if a factual assumption underlying an expert's opinion were demonstrably incorrect, that would be a topic to explore on cross-examination; a mistaken factual assumption would go to the weight to be afforded to the expert's testimony, not its

admissibility. See, e.g., *Perry v. Berkley***,** 996 A.2d 1262, 1271 (Del. 2010) (generally errors in factual basis of expert's opinion go to credibility of the testimony, not admissibility; it is for opposing party to challenge factual basis of expert's opinion on cross-examination).[19]

Third, Nationwide claims that the Court abused its discretion by awarding damages despite the fact that Simon did not identify specific damages resulting from breach of "individual sections of the PA or the implied covenant." NWBr. 48. As a threshold response, Nationwide neither provided countervailing evidence on this topic, nor preserved this issue for appeal. It is not enough to simply include this allegation in one's Appellant Brief.

Furthermore, Nationwide points to no law stating that, in a case involving multiple contract breaches, the finder of fact must identify *which* breaches caused which damages. The Court was required to find that Nationwide's breach of contract and the implied covenant caused damage to NorthPointe, and it so found. There was no error.

Fourth, Nationwide claims that the Court erred by including in its award of $605,785 [see [2] in box, *supra* p. 45] in "termination fees" for two NorthPointe-

[19] The factual challenges that Nationwide asserts as part of its third point (see NWBr. 49—that Simon failed to take into account the 2008 market crash and the fact that NorthPointe had other assets under management) likewise go to the weight properly afforded to his testimony, not to the admissibility of his testimony. In any event, these issues were not preserved for appeal.

branded mutual funds that were not specifically included by name in the termination fee provisions of Section D's Exhibit 1. There was no error. These amounts were not "made up" contractual termination fees, but rather reasoned computation of elements of damage suffered by NorthPointe.[20] In any event, Nationwide did not raise this issue in its post-trial briefing and has therefore waived this claim.

[20] Simon testified that there were two funds that did not have specific termination fee rates included in the PA, so he calculated appropriate termination fee rates. A1588; see also A1385 ("Exhibit D1(a) of the [PA] specifically stipulates that if Nationwide terminates/liquidates any of the Sub-Advised Funds, then NorthPointe would be entitled to receive a termination fee. . . . we calculated the termination Fee for the following Sub-Advised Funds.")].

CONCLUSION

For the reasons set forth herein, the July 16, 2014 Opinion and Judgment of the Superior Court should be affirmed in all respects, and the NorthPointe Appellees request such additional and further relief as to which they have shown themselves entitled.

YOUNG & ASSOCIATES

Rodger D. Young, *admitted pro hac vice*
Jaye Quadrozzi, *admitted pro hac vice*
27725 Stansbury Blvd, Suite 125
Farmington Hills, MI 48334
248.353.8620
248.479.7828 (facsimile)
efiling@youngpc.com

DALTON & ASSOCIATES, P.A.

Bartholomew J. Dalton (No. 808)
1106 W. 10th Street
Wilmington, Delaware 19806
302.652.2050
BDalton@BDaltonlaw.com

Attorneys for: NorthPointe Holdings, LLC,
Plaintiff/Counter-Defendant Below-Appellee; and
NorthPointe Capital LLC, Peter Cahill, Mary Champagne, Robert Glise, Michael Hayden, Jeffrey Petherick, Stephen Roberts, and Carl Wilk,
Third-Party Defendants Below-Appellees

Dated: October 28, 2014