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 C.A. No. N09C-11-141-ALR

APPELLANTS' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This appeal by Defendants-Appellants Nationwide Emerging Managers, Nationwide Corporation, and Nationwide Mutual Insurance Company (collectively, "Nationwide") is taken from a Superior Court final judgment. The parties' dispute arises out of a Purchase Agreement ("PA"), pursuant to which Nationwide sold its ownership interest in an investment advisory firm, NorthPointe Capital, LLC ("NorthPointe"), to Plaintiff-Appellee NorthPointe Holdings, LLC, a company formed by NorthPointe's management team.[1] NorthPointe Holdings filed its first complaint in November 2009, alleging fraud and contract claims. A52. On September 14, 2010, the Court's predecessor granted in part Nationwide's motion to dismiss the Second Amended Complaint, holding that "[t]o the extent the [contract] claim alleges a breach of §1(b) of the [PA], it is dismissed." A75. In October 2010, Nationwide filed a counterclaim and cross claims against NorthPointe's principals, alleging failure to comply with the terms of a Seller Subordinated Note that was part of the PA. In May 2012, NorthPointe Holdings filed its Third Amended Complaint. A133.

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[1]The PA's obligations at issue literally apply to Nationwide Emerging Managers ("NEM"), but NEM was an agent of Nationwide Mutual Insurance Company at all relevant times and Nationwide Corporation is a guarantor under the PA. All Nationwide-affiliated entities are thus referred to as "Nationwide" except where a particular affiliate's identity is meaningful.

The conduct at the heart of NorthPointe Holdings' claims – actions taken by Nationwide that caused the termination of NorthPointe's subadvisory contracts for certain mutual funds – was expressly authorized by the PA. The Court, however, in an Opinion ("Op.") issued on July 16, 2014 after a bench trial, *sua sponte* reformed the PA based on a "typographical error" and excised the Nationwide NVIT Mid Cap Growth Fund (the "NorthPointe NVIT") from Schedule 1 of the PA, a list of seven mutual funds covered by the PA's termination fee provisions. In so ruling, the Court acted beyond its subject matter jurisdiction, applied the wrong standard of proof, and overlooked NorthPointe's own arguments that the termination fee provisions *did* apply to the NorthPointe NVIT. The Court's ruling also directly conflicted with the explicit testimony of *NorthPointe's* 30(b)(6) witness that the inclusion of the NorthPointe NVIT in Schedule 1 was *not* a typo, and it ignores the fact that *every* term sheet and draft PA exchanged by the parties and their attorneys included the NorthPointe NVIT in the PA's termination fee provisions. The Court's reformation of the PA was central to the Court's ultimate findings that Nationwide breached the PA and the implied covenant of good faith. (NorthPointe did not prevail at trial on its fraud claim.)

There are numerous legal and factual errors in the Court's Opinion, including its holding that Nationwide acted "in direct violation of Section 1(b)"

even though that claim had already been dismissed. But the fundamental error from which all of the Opinion's other errors flow, was the Court's refusal to enforce the unambiguous language of §1(a) of the PA. That language provided that "for the funds included on Schedule 1," unless NorthPointe failed to meet certain performance standards or Nationwide "acted to satisfy its fiduciary obligations to the shareholders," if Nationwide "*take[s] any action to cause [the] termination*" of a NorthPointe sub-advisory agreement, then Nationwide "shall pay" a "Termination Fee," and "*the aggregate of all Termination Fees . . . shall not exceed $3.5 million and all such Termination Fees shall be paid by reducing the principal amount of the Seller Subordinated Note by the amount of such Termination Fees to be paid.*" A1078.[2]

Based on this language, Nationwide moved in December 2012 for summary judgment, arguing that the PA expressly authorized Nationwide to take any action, with or without cause, that resulted in the termination of NorthPointe's subadvisory agreements, subject to the possible payment of termination fees, capped in the aggregate at $3.5 million and paid in the form of a reduction in Nationwide's subordinated note. A184. NorthPointe did not suggest in its summary judgment briefing that the listing of the NorthPointe NVIT in Schedule 1

[2]Emphasis in quoted language is added unless indicated otherwise.

was a "typo"; and it did not offer — and has never offered to date — a competing interpretation of the PA that ascribes meaning to both the above-quoted language and the NorthPointe NVIT's listing in Schedule 1. *See* A208-54.

At oral argument in April 2013, the Court's predecessor stated: "This is not the Court of Chaneery where many issues can be decided on paperwork. The Supreme Court is very particular about searching through the record to find if there are any genuine issues of material fact. . . . And every judge on this court has experienced having that kind of reversal and we're very sensitive to it." A270. On May 17, 2013, during a teleconference convened within hours of his retirement, the Court's predeeessor denied Nationwide's motion on the ground that "[t]here are genuine issues of material faet as to each of the elaims[.]" Ex. B at 3. The Court's predeeessor did not identify the material facts it deemed in dispute; nor did it state whether the PA was ambiguous or identify a eompeting interpretation of the quoted language that rendered it ambiguous. *See id.*

In August 2013, the ease was reassigned and a trial date set. In September 2013, after NorthPointe had refused Nationwide's request that it identify the provisions of the PA in controversy and its competing interpretations of those provisions, Nationwide requested by letter that the Court "provide the parties with guidance as to the Court's interpretation of the provisions of the [PA] in

controversy" so that Nationwide could "prepare properly for trial[.]" A282. The Court denied Nationwide's request, noting that it "[did not] anticipate making legal rulings in advance of trial because that, in my judgment, is what trial is for." A307.

In the Joint Pretrial Stipulation, Nationwide identified as issues of law that remained to be litigated: whether the termination fee provisions of the PA were ambiguous and whether those provisions "can be deemed ambiguous when NorthPointe has yet to proffer an interpretation of these sections." A392. NorthPointe did not allege in its pretrial statement that the PA needed to be reformed or that the NorthPointe NVIT's inclusion in Schedule 1 was a typographical error. A359-418. In January 2014, Nationwide filed, and the Court denied, a motion *in limine* "to exclude parol evidence regarding the terms of the [PA]." A358.

In his opening statement at trial, NorthPointe's lawyer stated that "[§]1A is the portion of [the PA] that talks about *the seven funds and a termination fee if they are terminated.*" A1450. Although a NorthPointe witness testified at trial that the "termination fee discussed about the [NorthPointe] NVIT in Schedule 1" was "an error to the Schedule," A1475, NorthPointe did not refer to this testimony or argue in its closing brief that the NVIT Fund's inclusion in Schedule 1 was a

typographical error or that §1(a) did not apply to the NorthPointe NVIT. Rather, NorthPointe argued that because Nationwide *merged* the NorthPointe NVIT into another fund, its actions did not fall under the termination fee provisions in §1(a). Even though Nationwide noted in its own closing brief the conflict between NorthPointe's litigation position and its witnesses' trial testimony, NorthPointe still refused to adopt the "typo theory" in its reply closing brief, though it did state eryptically that the absence of termination fee formulae for *other* funds in the PA "casts grave doubt on whether §1(a), which purports to incorporate Schedule 1, is intended to encompass all seven funds." A582-83. NorthPointe's refusal to adopt the "typo theory" endorsed by the Court is understandable because the idea that NorthPointe would not include the NorthPointe NVIT — its largest fund — in the termination fee protections afforded by §1(a) makes no economic sense.

* * * *

Nationwide is mindful that the Court made adverse credibility findings as to five of its six employees who testified at trial and the chairman of the independent Nationwide Mutual Funds board. Op. at 8n.9 & 11, 12n.13, 28n.37, 40, 40n.51, & 50n.69. Nationwide submits that these findings resulted from two fundamental errors. First, the Court failed to recognize that Nationwide's and the board's fiduciary obligations required them to place the interests of the funds' shareholders

ahead of any concerns that Nationwide might owe termination fees to NorthPointe. Second, the Court failed to give due weight to the undisputed evidence that NorthPointe's performance fell well below *industry standards* (versus the PA's contractual performance standards). The Court criticized the Nationwide employees who recommended NorthPointe's termination based on NorthPointe's poor performance because they "conceded that the decision-making took place without consideration for Nationwide's contractual obligations to NorthPointe." Op. 38. But that was precisely what these individuals were obliged to do to satisfy their fiduciary duties. *See generally SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 191 (1963) (discussing "delicate fiduciary nature of an investment advisory relationship" and intent of Investment Advisers Act to "eliminate, or at least expose, all conflicts of interest which might incline as investment adviser—consciously or unconsciously—to render advice which was not disinterested.").

"The mere fact the trial court couched its findings in part on the determination of witness credibility does not render its ruling impervious to attack on appeal." *USA Cable v. World Wrestling Foundation Entertainment, Inc.*, 766 A.2d 462, 474 (Del. 2000). Although Nationwide disagrees with the Court's credibility determinations, Nationwide does not rely in this appeal on the testimony of any witness whose credibility was questioned by the Court.

SUMMARY OF ARGUMENT

I. The Court erred in *sua sponte* reforming the PA to excise the NorthPointe NVIT from Schedule 1 and in ruling that Nationwide's actions that caused the termination of NorthPointe as the NorthPointe NVIT subadvisor were not covered by §1(a) of the PA. The Court lacked subject matter jurisdiction to reform the PA; NorthPointe waived any claim for reformation; and, the Court applied the wrong evidentiary standard to reform the PA. More broadly, the Court erred in failing to enforce the unambiguous terms of the PA, which allowed Nationwide to cause the termination of NorthPointe's subadvisory agreements, with or without cause, subject to the possible payment of termination fees, capped in the aggregate at $3.5 million and to be paid as a reduction in Nationwide's seller Note.

II. The Court's ruling that Nationwide breached §1(b) of the PA violated the law of the case doctrine.

III. The Court erred in finding that Nationwide's refusal to pay termination fees, its redemption of assets from the NorthPointe NVIT, and its fee structure for the NVIT Multi Manager Mid Cap Growth Fund (the "NVIT MM") violated the implied covenant of good faith and fair dealing. The Court's rulings that Nationwide's failure to pay termination fees and its redemption of assets breached *both* the express terms of the PA *and* the implied covenant violated the well-

established principle that the implied covenant does not apply where the subject at issue is expressly covered by the contract. The Court's ruling that the redemption violated the implied covenant was also erroneous because, as the Court itself acknowledged, Nationwide would never have agreed to limit itself from redeeming the assets in question. The Court's ruling that the NVIT MM's fee structure violated the implied covenant is logically inconsistent with the Court's acknowledgement that the implied covenant did not preclude Nationwide from establishing a "competing fund"; moreover, there was no record evidence that Nationwide ever would have agreed to place limitations on the fees it charged for newly created funds.

IV. The Court erred in ruling that Nationwide's refusal to pay termination fees violated the PA. The Court's interpretation of the Nationwide Standards renders important contractual language a nullity. Moreover, the Court erred in admitting and relying on the testimony of NorthPointe's expert witnesses as to the meaning of the negotiated Standards and whether Nationwide violated them.

V. The Court made a mathematical error in computing its damages award, such that the award was $4,168,630 greater than NorthPointe's expert damages opinion which the Court adopted. The Court also erred in relying on unreliable expert testimony to determine damages.

STATEMENT OF FACTS

I. NorthPointe

When the PA was signed on July 19, 2007 (the "Signing Date"), NorthPointe derived its revenue from fees it earned investing $3.5 billion in assets under management ("AUM"). A362-63. Approximately 80% of the AUM was in institutional accounts held by pension funds and other large-scale investors; the other 20% came from seven Nationwide-sponsored funds for which Nationwide Fund Advisors (NFA) was the advisor and NorthPointe was a subadvisor. A1440. Six of those funds were eventually liquidated in 2009 and are the subject of this action. (NorthPointe continued as the subadvisor for the seventh fund long into this litigation.) The largest of the six funds was the NorthPointe NVIT ($439 million AUM), housed in the Nationwide Variable Insurance Trust (the "NVIT"), the assets of which came from and supported variable annuity and life insurance ("VA/VL") contracts sold by Nationwide. A363. The remaining five funds, ranging in size from $5 million to $116 million, were traditional mutual funds offered to the public by the Nationwide Mutual Funds Trust. A363.

II. Nationwide's Funds

As of the Signing Date, NFA was the advisor for 49 mutual funds and 40 NVIT funds. A1440. For many of these funds, subject to the approval of the

independent boards of the NVIT and Mutual Fund Trusts, NFA contracted with subadvisors to invest the funds' AUM. A1440. To carry out its fiduciary obligations to shareholders mandated by law, NFA would monitor the performance of the subadvisors and make recommendations to the trust boards to hire and fire subadvisors and liquidate and merge funds. *See* A1228-88; A1491; A1502. Like most fund sponsors, Nationwide frequently opened and closed funds. A1631. From 2007 through 2010, Nationwide launched 41 new funds, reorganized 26 funds, and liquidated or merged 15 funds. A1441. In 2007 and 2008, Nationwide created 18 new NVIT funds, one of which was the NVIT MM. A1610.

Consistent with industry norms, Nationwide offered multiple funds in particular investment styles. A1631. As of the Signing Date, Nationwide had in the mid-cap growth space three active funds (including the NorthPointe NVIT) and five walled-off funds (*i.e.*, open funds that were not accepting new investors) on its menu of funds offered to its VA/VL policyholders. A1611; A1615. To create the NVIT MM, Nationwide merged three existing funds, *and did not increase* the number of active mid cap growth funds on its menu. A1615; A1163-66.

III. The Nationwide Allocation Architect Program ("NAA"), Ibbotson, And The July 1, 2008 Redemption from the NorthPointe NVIT

The NAA was an asset allocation program offered by Nationwide to its VA/VL contract holders beginning in 2005. A1611. The NAA provided an

alternative means for policyholders to select the investment options used to support their VA/VL contracts (and the annuity payments those contracts guaranteed). A1616. Instead of selecting individual funds from among the approximately 80 funds on Nationwide's VA/VL menu, NAA participants could choose one of five asset allocation models (the "NAA Models"), each of which was comprised of a slate of underlying variable insurance trust funds. A1616. The NAA Models and the slate of funds in them were reconfigured every six months. A718-19; A750; A1616. About half of the funds on the VA/VL menu were Nationwide proprietary funds (*i.e.*, the NVIT funds); the other half were sponsored hy third-parties like Fidelity and T. Rowe Price. A1312; A1610.

NFA was *not* the advisor to the NAA; rather, Nationwide Investment Advisors, LLC ("NIA") and its predecessor, Nationwide Investment Services Corporation, were the NAA's SEC-registered advisors. A1611. Ibhotson Associate Advisors, LLC ("Ibbotson") was the NAA's suhadvisor. A1624. Ibbotson's role in the NAA was disclosed in SEC-audited Program Brochures which were puhlished on Nationwide's website and distributed to VA/VL customers as required by SEC regulations. A1611-12. The Brochure read in part:

> NIA has hired Ibbotson [ ] as sub-advisor to the NAA Program. ***Ibbotson develops and maintains the NAA Program Models, including the selection of funds available in the Models***. * * * * [Ibbotson] uses a number of qualitative and quantitative tools to . . .

> identify and ***select investment managers or mutual funds***[.] * * * * NIA will update the Models, ***based on the information provided by Ibbotson***, on or about January 1 and July 1 of each year.

A718-19. Similarly, in Form ADVs filed with the SEC, Ibbotson's role was described as follows: "Ibbotson develops and maintains the NAA Program Models, including the selection of funds available in the Models" and "Ibbotson *has sole control* over the development and ongoing maintenance of the models[.]" A641; A1612. These SEC disclosures were consistent with the terms of NIA's contract with Ibbotson, A599 ("Ibbotson shall have sole control over the development and ongoing maintenance of the Models"), the customer agreements executed by the VA/VL contract holders, A672 ("NIA has hired an independent third-party to develop and maintain the [NAA] models"), as well as hundreds of thousands of marketing brochures distributed by Nationwide before the PA was signed. A750 ("Ibbotson, as an independent third-party advisor, builds the model portfolios for [NAA] and selects the underlying investment options"). Ibbotson's role as an *independent* selector of the funds was important because Nationwide's menu of funds included both NVIT and third-party funds.

That Ibbotson had sole authority to select the funds was also supported at trial by the testimony of John Grady, whom the Court deemed "credible"; Hutch Schafer, a Nationwide employee whose credibility the Court did not question; and,

most importantly, John Thompson, who had worked for Ibbotson and was the only trial witness not affiliated with either party. A1507; A1613-14; A1624.

The NAA featured prominently at trial because on July 1, 2008, nine months after the PA's closing, at the direction of Ibbotson, A1616, Nationwide redeemed $1.3 billion of NAA AUM from 13 funds and reallocated it to 14 funds. A1324. As part of that reallocation, Nationwide redeemed $262 million from the NorthPointe NVIT. A368; A1324. Approximately $135 million of that AUM was moved into the NVIT MM; the remaining $127 million was moved to a different investment strategy. A368; A1324. John Thompson, who oversaw Ibbotson's NAA work, testified at trial that Ibbotson directed these changes and that Nationwide never interfered with, or attempted to influence, Ibbotson's decisions with respect to the selection of funds for the NAA models. A1624.

The Court found that "Nationwide's argument [ ] that [its] advisor, Ibbotson, had recommended the actions taken by Nationwide, and that Ibbotson's recommendations were binding on Nationwide, and that Nationwide had no discretion once Ibbotson made these recommendations . . . was not supported by any credible record evidence." Op. 36-37. In light of Nationwide's SEC filings, customer agreements, and marketing materials, and the unrebutted testimony of Thompson, Grady, and Schafer, this finding is clearly erroneous. Short of firing

Ibbotson, Nationwide had no lawful choice but to implement Ihbotson's decisions; there was *no evidence* – a document or fact witness testimony – to the contrary.

The Court's finding that "there was no contemporaneous mention of Ibbotson in any of the notifications from Nationwide to NorthPointe about the various . . . redemptions" was also clear error. Op. 37. Nationwide's notification to NorthPointe as to the July 1, 2008 redemption was introduced at trial and reads in part: "[W]c just learned that *Ibbotson* has completed its semiannual review of the [NAA] models . . . . *Ibbotson* has sole authority to select funds in the models . . . . *Ibbotson* has determined that approximately $260 million should be redeemed out of the [NorthPointe NVIT]." A1168.

IV. The Purchase Agreement

Nationwide's sale of its 65% interest in NorthPointe was part of a corporate initiative to divest active money management businesses and move to a subadvisor model. A364. The parties first discussed a possible management buy-out ("MBO") at a dinner in June 2006. NorthPointe's CEO Michael Hayden made an initial purchase offer by letter dated December 21, 2006, and the parties thereafter exchanged numerous term sheets and draft PAs. *See* A681, A730, A760, A774, A780, A787, A830, A835, A840, A883, A946. Hayden and NorthPointe's counsel, Goodwin Procter LLP, negotiated the deal on behalf of NorthPointe.

A364-65. Harry Hallowell and NFA's then-President John Grady, with Merrill Lynch and Skadden's assistance, conducted the negotiations for Nationwide. A364-65. Significantly, Peter Cahill of NorthPointe, whose testimony was the basis for the Court's reformation of the PA, did not personally communicate with anyone from Nationwide about the PA after the June 2006 dinner. A1549.

A. The Purchase Price

Section 1.2 of the PA defines the three-component "Purchase Price" NorthPointe paid for Nationwide's ownership interest: "the aggregate of the Closing Consideration, Earnout (as set forth in [§]1.6 herein), and the Termination Fees (as set forth in [§]1.7[.])." A1019. The "Closing Consideration" consisted of $16 million in cash and a $9 million seller subordinated note (the "Note"). A1018-19. Section 1.6 created a potential earnout for Nationwide of up to $3.5 million if NorthPointe's revenues for the three years after the closing date exceeded certain levels. A1021. Conversely, §1.7 gave NorthPointe "the right to receive from [Nationwide] termination fees, which shall not exceed in the aggregate [$3.5 million] subject to the conditions set forth in Exhibit D." A1021. ***Thus the Purchase Price was $25 million, plus or minus up to $3.5 million, the exact price to be determined bused on post-closing circumstances; and the termination fee provisions enabled NorthPointe to claw back up to $3.5 million of the closing***

consideration if Nationwide caused the termination of sub-advisor contracts prematurely and without justification.

B. Section 1(a) of Exhibit D

Section 1(a) of Exhibit D, which lies at the heart of this case, has four clauses, the first of which reads that Nationwide

> hereby agrees that for a three-year period following the Closing Date (the "Restricted Period"), it shall . . . not ***terminate*** or propose to the board of trustees (the "Fund Board") ***for the funds included on Schedule 1 to Exhibit D*** (each a "Sub-Advised Fund" and collectively, the "Sub-Advised Funds") that such Sub-Advised Fund terminate[ ] *[NorthPointe's]* ***sub-advisory agreement*** with such Sub-Advised Fund, ***or take any other action to cause such termination;***

A1078. The grammatical structure of this clause is clear: the object of the operative verb ("terminate") is "sub-advisory agreement." Moreover, the clause expressly applies to "any other action to cause such termination[.]" Thus, §1(a) applies whether Nationwide fired NorthPointe or, alternatively, persuaded the Trust Boards to liquidate, merge, close, or otherwise dispose of a fund included in Schedule 1, causing NorthPointe's termination as a subadvisor.

The second clause of §1(a) qualifies the first clause and requires Nationwide to pay fees in the event it caused NorthPointe's termination as a subadvisor:

> provided, that in the event (x) [Nationwide] . . . take[s] any action to cause such termination and (y) [NorthPointe's] sub-advisory agreement with such Sub-Advised Fund is terminated, then [Nationwide] shall pay a fee to [NorthPointe Holdings] in the amount

set forth in Schedule 1 to Exhibit D under the name of such Sub-Advised Fund under the heading "Termination Fee" (the "Termination Fee"); A1078.

The third clause qualifies the second clause, and, consistent with §1.7, caps the aggregate termination fees at $3.5 million. Payment of the fees is to be in the form of a reduction in the outstanding principal in Nationwide's Note:

> provided further, that ***the aggregate of all Termination Fees payable to [NorthPointe Holdings] by [Nationwide] pursuant to this subsection shall not exceed $3.5 million and all such Termination Fees shall be paid by reducing the principal amount of the Seller Subordinated Note by the amount of such Termination Fees to be paid***, or in cash, to the extent such Termination Fees exceed such principal amount; A1078.

The fourth and final clause of §1(a) sets forth the circumstances under which NorthPointe is not entitled to termination fees:

> provided however, that, notwithstanding the foregoing, [NorthPointe Holdings] shall not be entitled to receive a Termination Fee in the event [Nationwide] or the Fund Board of any Sub-Advised Fund terminates [NorthPointe's] sub-advisory agreement with such Sub-Advised Fund after [Nationwide] or the Fund Board, as applicable, has determined in good faith that its termination of [NorthPointe] (or its recommendation to the Fund Board to terminate [NorthPointe]) is either (x) necessary for [Nationwide] and/or the Fund Board to satisfy its fiduciary obligations to the shareholders of the Sub-Advised Fund or (y) a result of [NorthPointe's] failure to have satisfied the performance standards specified in Schedule 2 to Exhibit D for such Sub-Advised Fund (such criteria, the "Nationwide Standards" and/or any such termination, a "Permitted Termination")[.] A1078.

Thus, the parties agreed that Nationwide owed no termination fees if it (1) acted to fulfill its fiduciary obligations to fund shareholders or (2) believed in good faith that NorthPointe failed to meet the "Nationwide Standards." *See* A1568.

C. Schedule 1 to Exhibit D

Section 1(a) applied to "the funds included on Schedule 1," produced below:

Sub-Advised Funds:

- Nationwide NVIT Mid Cap Growth Fund
- Nationwide Micro Cap Equity Fund
- Nationwide Mid Cap Growth Fund
- Nationwide Value Opportunities Fund
- Nationwide Large Cap Value Fund
- NorthPointe Small Cap Value Fund
- NorthPointe Small Cap Growth Fund

Termination Fee:

Nationwide NVIT Mid Cap Growth Fund
Nationwide Value Opportunities Fund
Nationwide Large Cap Value Fund

- (Number of whole months remaining in the Restricted Period) x (the fund net assets on the last day of the Restricted Period) x (0.0333%)

Nationwide Micro Cap Equity Fund

- (Number of whole months remaining in the Restricted Period) x (the fund net assets on the last day of the Restricted Period) x (0.0750%)

A1080. Although the Schedule lists seven funds covered by §1(a), it does not set forth a termination fee formula for three of the funds: the Nationwide Mid Cap Growth Fund and the two NorthPointe-branded small cap funds. Notably, NorthPointe's damages expert, Lawrence Simon, calculated — and the Court adopted as part of its damages award — termination fees for these three funds,

using the same formula (with adjusted fee rates) set forth in the Schedule for the other four funds. Op. 57-58; A1387. Although Nationwide disputes that termination fees were owed for those funds, it does not dispute that had termination fees been owed, they were correctly calculated by Simon.[3]

V. NorthPointe's Performance Post-Closing

The closing for the PA occurred on the last business day of September 2007, less than two weeks before the stock market reached what was then, and until 2013, its all-time high. Op. 26. With the exception of the Large Cap Value Fund, all of the NorthPointe subadvised funds listed in Schedule 1 performed poorly by industry standards from the closing through the last quarter (ending September 30, 2008) before Nationwide took action that resulted in the termination of NorthPointe's subadvisory agreements for those funds. A1310. (Notably, but ignored by the Court, Nationwide never took action to terminate NorthPointe's agreement to subadvise the Large Cap Value Fund, its only fund that outperformed its one-year and three-year industry benchmark. A1244.) For example, it was undisputed that for *every* quarter starting with the fourth quarter of 2007 and

[3] The parties agreed at trial that the formulae contain a scrivener's error and that the second multiplier in the formulae ("the fund net assets on the last day of the Restricted Period") should read "the fund net assets on the date of termination." A1526.

continuing through the third quarter or 2008, *each* of the six funds was ranked in the bottom 30% of it Lipper peer group on both a one-year and three-year trailing basis. A1310. NorthPointe's Micro Cap fund was ranked in the bottom 2%, 2%, and 1% respectively for the first three quarters in 2008 on a one-year trailing basis. A1310. The NorthPointe NVIT never ranked better than the bottom 12% of its peers for a one-year basis for *any* of the quarters during that same time frame, and ranked in the bottom 19%, 9% and 10% on a three-year trailing basis. A1310. As of September 30, 2008, the NorthPointe NVIT was ranked in the bottom 10% of its Lipper peer group on both a one-year and three-year basis and had underperformed its Russell benchmark by 492 basis points and 328 basis points respectively for those periods. A1220. As Nationwide's expert, Professor Eric Sirri, whom the Court deemed credible, testified, "when you look at performance of [NorthPointe's] funds, it was really, very poor." A1635.

VI. NFA's Actions to Cause The Termination of NorthPointe as Subadviser

By letter dated November 25, 2008, NFA informed NorthPointe of its decision to recommend that the Trust Boards merge the NorthPointe NVIT into the NVIT MM and liquidate four other NorthPointe-subadvised funds. A1216. NFA cited as the basis for its decision the funds' poor performance, and stated that it was acting in the "best interests of [their] shareholders." A1216-19. NFA further

stated that its actions constituted a "Permitted Termination" (and thus did not require termination fees) because the performance of each of the five funds failed to meet the Nationwide Standards. A1216-19. The Boards approved the recommendations in December 2008, *see* A1222, and the five funds were ultimately liquidated in April 2009. A1325.

VII. Extrinsic Evidence of the Parties' Understanding of the PA

Putting aside the testimony of Nationwide's employees, Nationwide introduced at trial overwhelming documentary evidence to show that the parties understood that §1(a) governed Nationwide's actions that resulted in the termination of NorthPointe's subadvisory agreements, including for the NorthPointe NVIT. That evidence, which the Court failed to address, included:

- The term sheets and draft PAs, *every one* of which listed the NorthPointe NVIT as the first fund in the termination fee provisions. A777; A783; A788; A831; A836; A937; A1001.

- NorthPointe's own board minutes for a meeting held two weeks after it was notified of NFA's decision to recommend the merger of the NorthPointe NVIT and liquidation of four of the six other funds. The minutes read: ***"[A]ll of the funds will be closing (except Large Cap Value and Value Opportunities) in April 2009. Pursuant to the Purchase Agreement between Nationwide and NorthPointe Holdings, if Nationwide removes the money from these funds prior to September 201[0] for reasons other than those listed in the Exhibit D of the Purchase Agreement, NorthPointe does not owe $3.5M of the loan."*** A1290.

- NorthPointe's April 8, 2009 letter to Nationwide in which it stated: "The systematic and substantial withdrawals by [Nationwide] from the [NorthPointe NVIT] and the proposed merger of this Sub Advised Fund into the [NVIT MM] (***and the consequent termination of NorthPointe as an advisor***) constitute breaches of the covenants and obligations of [Nationwide] set forth in Exhibit D of the Purchase Agreement." A1295.

Thus, unlike the position it argued at trial, NorthPointe in fact understood that the merger of the NorthPointe NVIT caused NorthPointe's termination as a subadvisor and therefore was governed by §1(a).

VIII. The Court's Opinion

In addition to reforming *sua sponte* the PA to excise the NorthPointe NVIT from Schedule 1, the Court ruled that Nationwide's actions with respect to that fund breached §1(b) of the PA and the covenant of good faith and fair dealing. The Court also ruled that Nationwide breached §1(a) of the PA by not paying NorthPointe termination fees, and that Nationwide breached provisions in the PA that required it to include NorthPointe in marketing campaigns and engage in discussions to transfer the sponsorship of the two NorthPointe-branded funds. Nationwide believes the Court's rulings with respect to the marketing and sponsorship obligations were erroneous; however, because of space constraints, it has not set forth arguments on those rulings in this brief, other than to note that the claims in question fail because no proof of resultant damages was offered.

ARGUMENT

1. The Superior Court Erred in Reforming the PA and Ruling That Nationwide's Actions That Caused The Termination of NorthPointe's Subadvisory Agreement for The NorthPointe NVIT Were Not Covered by §1(a) of Exhibit D

A. Questions Presented

Did the Court have jurisdiction to reform *sua sponte* the PA? Did the Court apply the correct standard to reform the contract? Did NorthPointe waive its right to reformation of the PA? Preserved: Not possible; though a defendant may raise challenges to subject matter jurisdiction at any time. *See Plummer v. Sherman*, 861 A.2d 1238, 1243 (Del. 2004).

Did the Court err in substituting its views of the parties' intent for the plain meaning of the PA? Preserved: A160, A349.

B. Standards of Review

Subject matter jurisdiction issues and a judicial interpretation of a contract are reviewed *de novo*. *See Asbestos Workers Local Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935, 940 (Del. 2007) (jurisdiction); *Alta Berkeley VI C. V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) (contract interpretation).

C. Merits of The Argument

Based on the testimony of Peter Cahill, the Court ruled that the NorthPointe NVIT's listing in Schedule 1 was a "typographical error" and "the *preponderance*

of the evidence established" that Schedule 1 "incorrectly states that it is applicable to the [NorthPointe] NVIT." Op. 22. This ruling constitutes reversible error.[4]

1. The Superior Court Lacked Jurisdiction to Reform the PA

Fixing a "typographical error" in a contract is "tantamount to reforming" the contract. *Brandywine Development Group v. Alpha Trust*, 2003 WL 241727, at *6 (Del. Ch. Jan. 30 2003). Reformation is an equitable remedy, and thus the Superior Court lacked jurisdiction to excise *sua sponte* the NorthPointe NVIT from Schedule 1. *See Cerberus International, Ltd. v. Apollo Management, L.P.*, 794 A.2d 1141, 1150 (Del. 2002); *Catamaran Acquisition Corp. v. Spherion Corp.*, 2001 WL 755387, at *5 (Del. Super. 2001) ("In Delaware, reformation is available only in the Court of Chancery.").

2. NorthPointe Waived Any Claim for Reformation of The PA

NorthPointe did not assert a reformation claim and never argued that the NorthPointe NVIT was erroneously listed in Schedule 1. It therefore waived its right to have the PA reformed. *Brinckerhoff v. Enbridge Energy Co.*, 2012 WL

[4] The Court held that Nationwide's counterclaim and cross claims "fail because Nationwide committed the first material breach of contract." Op. 50. Accordingly, a reversal of the Court's rulings on NorthPointe's contract claims would necessitate a reversal of the Court's rulings against Nationwide's counterclaim and cross claims.

1931242, at *1 (Del. Ch. May 25, 2012) (failure to raise reformation request in brief and oral argument constituted waiver), *aff'd,* 67 A.3d 369 (Del. 2013).

In fact, NorthPointe's position from the outset of this case has been that the NorthPointe NVIT *was* properly listed on Schedule 1 and covered by §1(a). In its initial Complaint, for example, NorthPointe alleged that the "Sub-Advised Funds" included all seven funds listed on Schedule 1 and that it "only agreed to the $25 million purchase price after Nationwide agreed to enter into covenants not to terminate the sub-advisory agreements related to *each of the Sub-Advised Funds* without specific cause for three years after the formal closing[.]" A55-56. During discovery, Terry Gardner, NorthPointe's 30(b)(6) witness on the topic of the PA's interpretation, was explicitly asked at his deposition whether "NorthPointe's interpretation of Schedule 1[ ] is that [the NorthPointe NVIT] is properly listed as one of the seven funds in Schedule 1 to Exhibit D?" Gardner replied, "Yes." He was then asked, "And it's properly listed because the termination provisions of [§1(a)] do apply to the [NorthPointe NVIT]?" To which Gardner replied, "With respect – not with respect – only to certain types of actions." A1567.[5]

[5]Nationwide asked these questions because, in an earlier deposition, Hayden had suggested that the NorthPointe NVIT was erroneously listed in Schedule 1. At trial, Gardner testified that his interpretation had "changed," that the NorthPointe NVIT's listing "looked like a typo and that's

Gardner's deposition testimony turned out to be a preview of NorthPointe's position a trial – *i.e.*, that §1(a) applied to certain, unspecified actions Nationwide might take "with respect" to the NorthPointe NVIT, but did not apply to Nationwide's *merger* of the NorthPointe NVIT into another fund. As NorthPointe's counsel explain in his opening statement:

> [Nationwide] did not terminate the [NorthPointe NVIT]. They ultimately replaced and merged it. * * * * ***[The PA], of course, involved Nationwide promising not to terminate the sub-advisory agreement on any of the seven funds for three years, or to pay a termination fee, if it did.*** * * * * ***[Section] 1A is the portion of Exhibit D that talks about the seven funds and a termination fee if they are terminated.*** Again, of course, [the NorthPointe NVIT] wasn't [terminated.] A1448-50.

At trial, NorthPointe's Cahill testified that "[§]1(a) does *not* apply to the [NorthPointe NVIT]. It has its own paragraph, and besides it wasn't terminated, it was merged." A1474. When asked on direct examination, "why was a termination fee discussed about the [NorthPointe NVIT] in Schedule 1[?]," he answered: "I believe it's an error to the schedule, but for this case I don't really see it mattering. §1(b) protects the NVIT fund. And NVIT was merged not terminated." A1475. Cahill retreated somewhat from this position on cross-examination and refused three times to state without qualification that the listing of the NorthPointe NVIT

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probably what it was," that the fund was "nominally listed," and "*there is some question as to whether or not that's a typo, or accurate or not.*" A1564; A1566-67.

under the "Termination Fee" heading was an error, saying instead that the listing "was *probably* an error." A1551; A1553.

In its closing brief, NorthPointe ignored Cahill's testimony and argued that "[d]istilled to its essence, [§]1(a) . . . states that for three years following closing, Nationwide agreed not to terminate the sub-advisory agreements *for any of the funds*, and if it decided to do so notwithstanding this agreement, it had to pay 'termination fees' up to $3.5 million unless it concluded in good faith that NorthPointe had not complied with Nationwide's performance standards." A458. After Nationwide noted in its closing brief the "striking" inconsistency between this position and Cahill's testimony, NorthPointe still did not endorse the idea that Schedule 1's listing of the NorthPointe NVIT was a typo. A520. Instead, NorthPointe stated in its reply brief that the absence of termination fee formulae for *other* funds in the PA "casts grave doubt on whether §1(a), which purports to incorporate Schedule 1, is intended to encompass all seven funds." A582-83. Two pages later, however, NorthPointe made clear that, in its view, §1(a) was unambiguous (and thus not in need of reformation): Indeed, in a truly remarkable about-faee explained only by the overwhelming evidence Nationwide introduced at trial, NortPointe actually argued that it would be "improper to consider parol evidence in support of Nationwide's [interpretation of] §1(a)." A584-85.

NorthPointe's refusal to endorse the typo argument adopted by the Court is understandable. The PA was negotiated by sophisticated parties and law firms, and the termination provisions were a centerpieee of the negotiations. NorthPointe discussed its desire for a termination fee clawback in its initial offer, and the NorthPointe NVIT was the first fund listed in the termination fee provision that became §1(a) *in every term sheet and draft PA exchanged by the parties.* A681; A774; A780; A787; A830; A835; A840; A883; A946. Of course, fundamentally, it makes no economic sense that NorthPointe would exclude its so-called "crown jewel" fund from the PA's termination fee provisions. *See* A1460.

In any event, it would be manifestly unjust for NorthPointe to benefit from its decision not to advocate for the "typo theory." Had Nationwide known that NorthPointe — or the Court — was contemplating a reformation of the contract, it could have sought the depositions of NorthPointe's lawyers and even waived its own privileged eommunications and attorney work product to rebut the notion that the NorthPointe NVIT's listing was a typographical error.

3. The Court Applied The Wrong Standard to Reform the PA

The Court held that "the *preponderance of the evidence* established that Sehedule 1 applied to the Nationwide Mid Cap Growth Fund and not the [NorthPointe] NVIT." Op. 22. But to reform a contract, "the plaintiff must show

by clear and convincing evidence that *the parties* came to a specific prior understanding that differed materially from the written agreement." *Cerberus*, 794 A.2d at 1150. In this case, not only did the Court expressly apply the wrong burden of proof, but there is *no* record evidence that *Nationwide* had an understanding that the NorthPointe NVIT was wrongly listed in Schedule 1. On the contrary, Grady, who drafted §1(a) and whom the Court deemed "credible and reliable" and with "no stake in the outcome of the case," testified that "the termination provisions in Section 1A ***applied to all the funds on [Schedule 1], including the [NorthPointe NVIT]***." A1495. Moreover, the deposition testimony of NorthPointe's own 30(b)(6) witness and the fact that every term sheet and PA draft included the NorthPointe NVIT fund in the PA's termination provisions show clearly and convincingly that NorthPointe itself did not believe that the NorthPointe NVIT was erroneously listed in Schedule 1. Indeed, Cahill, whose testimony the Court cited as the basis for its reformation of the PA, refused three times on cross-examination to state without qualification that the listing of the NorthPointe NVIT was a typographical error, conceding only that the listing was "prohably an error." A1551; A1553.

4. The Court Erred in Failing to Enforce The Unambiguous Meaning of The PA

The PA's termination provisions are unambiguous. "To be ambiguous, a disputed contract term must be fairly or reasonably susceptible to more than one meaning." *Alta,* 41 A.3d at 385. To this date, NorthPointe has never offered a reasonable competing interpretation of the PA that gives meaning to §1(a).

NorthPointe's trial theory was that the NorthPointe NVIT was merged, not terminated, and that therefore that "the actions taken by Nationwide that affected the [NorthPointe NVIT] do not fall within the provisions of §1(a)." A581. As counsel stated in his opening: "the important portion of the [PA], from our perspective, is not 1A . . . it is 1B[.]" A1451. NorthPointe argued in its closing, A470, and the Court ruled in its Opinion, Op. 23, that Nationwide's actions violated *both* the express terms of §1(b) and the implied covenant. Putting aside for the moment the fact that the Court had previously dismissed the §1(b) contract claim, §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).

In §1(b), Nationwide agreed that for three years post-closing it shall:

> subject to [NorthPointe's] compliance with the Nationwide Standards, not replace [NorthPointe] or engage a concurrent sub-adviser with respeet to the [NorthPointe NVIT] ***such that, immediately after giving effect to any such replacement or***

engagement, [NorthPointe] shall have less than $300 million in assets under management in such fund[.]

A1078. Because the *replacement* of NorthPointe as a sub-advisor for all of the AUM in the NVIT Fund would necessarily involve NorthPointe's *termination* as a subadvisor (subject to §1(a)), the italicized language is critical to understanding the meaning and intent of §1(b). *See Alta,* 41 A.3d at 386 ("[i]t is well established that a court interpreting any contractual provision, . . . must give effect to all terms . . . , read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument."). Focusing on this language, it is clear that §1(b) was intended to address the situation where Nationwide did not cause NorthPointe's termination as the NorthPointe NVIT's subadvisor but nonetheless significantly reduced NorthPointe's fees by transferring AUM to the management of a co-subadvisor.

Nothing in §1(a) required compensation to NorthPointe if Nationwide transferred all but $1 of the NorthPointe NVIT's AUM to the control of a concurrent subadvisor, but did not terminate NorthPointe's subadvisory agreement. Section 1(b), however, prohibited Nationwide from hiring (*i.e.*, "engaging") a new concurrent subadvisor to the fund or "replacing" NorthPointe as the subadvisor for some portion of the fund's AUM if doing so would cause NorthPointe's share of the fund's AUM to fall below $300 million (but above $0, so that NorthPointe was not terminated).

Given the relative size of the NorthPointe NVIT, it makes no sense that NorthPointe would intentionally "carve it out" from §1(a) and rely solely on §1(b) to protect the fees it earned from managing the fund. Section 1(b) provides *less*, not more, protection than §1(a). On its face, §1(b) affords *no* protection to NorthPointe if Nationwide caused the termination of NorthPointe's subadvisory agreement but did not engage or replace NorthPointe with another subadvisor. Thus, if only §1(b) addressed the NorthPointe NVIT, Nationwide could liquidate the fund or fire NorthPointe and manage the fund itself without a subadvisor and not have to compensate NorthPointe; or, Nationwide could do what occurred here: merge the fund with another fund. Indeed, as NorthPointe admitted in its closing brief: "It is true that nothing in the [PA] expressly prohibited Nationwide from . . . moving money out of the [NorthPointe NVIT] and into the new fund, or merging the [NorthPointe NVIT] into the new competing fund." A472.

The only reading of the PA that gives meaning to both §1(a) and §1(b) and makes economic sense is Nationwide's reading, under which NorthPointe's "crown jewel" was protected by *both* §1(a) *and* §1(b). If Nationwide took actions that caused the termination of the NorthPointe NVIT subadvisory agreement, then the termination fee provisions of §1(a) were triggered. But, if Nationwide took certain actions that stopped short of terminating the subadvisory agreement, but

nonetheless caused a substantial reduction in NorthPointe's fees, then §1(b) protected NorthPointe's interests. As Grady, who drafted both provisions and whom the Court found to be "a credible and reliable witness who had no stake in the outcome of the case," testified:

> [§1(b)] was supplemental protection that went beyond what 1A covered because 1A is about terminating them. [1B] addresses [a] very specific fear, although they wouldn't be terminated they'[d] still suffer economic diminution or harm as a result of our action. So [1]B was intended to provide an additional separate comfort on just this fund with respect to this idea of [engaging] a co-advisor. A1501.

Grady's testimony is consistent with the documentary evidence introduced at trial. NorthPointe discussed the claw back termination fee provision that became §1(a) in its initial $16 million offer in December 2006 and expressly linked its willingness to increase the purchase price to Nationwide's acceptance of the claw back. A681. The termination fee provision was included in every term sheet that followed. A777; A783; A788; A831; A836; A937; A1001. The $300 million AUM "floor obligation" that ultimately took the form of §1(b) was not raised in the negotiations until May 2007, after three term sheets had already been exchanged. A774; A780; A787; A830. Tellingly, the purchase price in the third term sheet, which NorthPointe offered, was the same purchase price in the PA. A788. The fact that the late introduction of §1(b) to the negotiations was not

accompanied by an adjustment of either the $25 million closing consideration or the $3.5 aggregate termination fee cap confirms that §1(b) was not intended to trump §1(a) or carve the NorthPointe NVIT out from §1(a)'s termination provisions.

Further confirmation that NorthPointe understood that §1(a), not §1(b), governed Nationwide's actions with respect to the NorthPointe NVIT that gave rise to this action is found in two additional contemporaneous documents not addressed by the Court in its Opinion: NorthPointe's board minutes for December 2008 and its April 2009 letter (objecting to NorthPointe NVIT's merger and the "consequent *termination* of NorthPointe as an advisor"). *See supra* 22-23; A1290; A1295. Indeed, because the Court gave no weight to these documents or the terms sheets and draft PAs in its analysis of the extrinsic evidence, the Court's fact findings "are not the product of an orderly and logical deductive process" and therefore would be erroneous even if the Court properly could have considered extrinsic evidence. *See Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1181 (Del. 1992).

II. The Court's Ruling That Nationwide Breached §1(b) Violated The Law of The Case Doctrine

A. Question Presented

Whether the Court erred in ruling in NorthPointe's favor on a claim that had already been dismissed. Preserved: A1643.

B. Standard of Review

This issue of law is reviewed *de novo*. *Cf. Sonitrol*, 607 A.2d at 1181.

C. Merits of The Argument

The Court's predecessor granted Nationwide's motion to dismiss "[t]o the extent the [contract] claim alleges a breach of §1(b) of the [PA.]" A.75. The Court, however, ruled that Nationwide's conduct "was in direct violation of Section 1(b)." Op. 48. This ruling violated the law of the case doctrine. *See Frank G.W. v. Carol M.W.*, 457 A.2d 715, 718-19 (Del. 1983). Although exceptions to the doctrine can be entertained "in extraordinary circumstances," *id.*, such circumstances do not exist here, as the Court confirmed before closing arguments that the doctrine would apply, and the Third Amended Complaint did not allege a breach of §1(b). A147; A1643.[6]

[6] In explaining its §1(b) ruling, the Court stated that "[a]ccording to Grady, . . . Nationwide could agree – and did agree -- not to replace NorthPointe as the subadvisor of the NorthPointe

III. The Court Frred in Finding A Violation of The Implied Covenant

A. Question Presented

Whether Nationwide's failure to pay termination fees, its redemption of assets from the NorthPointe NVIT, or its fee structure for the NVIT MM violated the implied covenant of good faith and fair dealing? Preserved: A160; A497.

B. Standard of Review

This issue of law is reviewed *de novo*. *Cf. Sonitrol*, 607 A.2d at 1181.

C. Merits of The Argument

The Court erred in holding that Nationwide's failure to pay termination fees, its redemption of assets from the NorthPointe NVIT, and its fee structure for the NVIT MM violated the implied covenant of good faith.

1. Failure to Pay Termination Fees

The Court held that Nationwide's failure to pay termination fees constituted *both* a violation of §1(a) *and* the implied covenant. Op. 29, 47. This ruling violates the well-established principle that the implied covenant does not apply "where the subject at issue is expressly covered by the contract." *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992), *aff'd*,

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NVIT." Op. 23. This finding, made without any citation to the record, is clearly erroneous. In fact, Grady testified that Nationwide was legally required to retain the ability to fire NorthPointe without penalty so that it could satisfy its fiduciary obligations. A1498.

609 A.2d 668 (Del. 1992). In addition, the ruling is erroneous beeause Nationwide's refusal to pay termination fees cannot be fairly characterized as arbitrary or unreasonable. *See id.* at 1126 (implied covenant breach requires proof that "party has acted arbitrarily or unreasonably"). The Court based its ruling on what it ealled Nationwide's "disingenuous claim" that NorthPointe failed to meet the Nationwide Standards. But the Court itself necessarily believed that the Standards were susceptible to multiple reasonable interpretations, as it admitted, over Nationwide's objeetion, extrinsic evidence, ineluding expert testimony, as to the interpretation of the Standards. *See* A357; A358; A1571-73; A1585-86; *see also Alta,* 41 A.3d at 385.

2. <u>The July 1, 2008 Redemption of AUM</u>

The Court also conflated the implied eovenant theory with an express breach when it held that Nationwide's NAA redemption on July 1, 2008 from the NorthPointe NVIT constituted both a violation of the PA and the implied eovenant. *See* Op. 48. The Court's ruling that the redemption constituted an implied covenant breaeh also was erroneous because, as the Court itself acknowledged (Op. 23), Nationwide never would have agreed to limit itself from redeeming assets from the NorthPointe NVIT, and there is nothing in the PA to suggest otherwise. *See Nemec v. Scrader*, 991 A.2d 1120, 1127 n. 20 (Del. 2010) ("[A]

court can only imply a contractual obligation when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue[.]") (citation omitted). On this issue, there can be no doubt, because the undisputed, contemporaneous evidence shows that Nationwide *specifically rejected* language proposed by NorthPointe for §1(b) that would have impaired Nationwide's ability to redeem shares from the NorthPointe NVIT. The proposed language, in a draft of the PA authored by NorthPointe's lawyer, read:

> [Nationwide] shall: . . . subject to [NorthPointe's] compliance with the Nationwide Standards, ***not redeem shares*** in the [NorthPointe NVIT] such that, immediately after giving effect to any such redemption, Seller and its affiliates would have less than $300 million invested in such fund.

A934. On July 3, 2007, Grady emailed his colleagues and explained why Nationwide could not agree to this language:

> [*W*]***e cannot promise not to redeem shares out of the [NorthPointe NVIT] since those shares are actually reflective of contract-level allocations made by holders of VA and/or VL products.*** What we can promise [is] . . . not to replace NorthPointe or engage another subadvisor on this Fund such as to make NorthPointe the manager of less than $300m of fund assets in the absence of a violation of the Nationwide Standards.

A944.

Lastly, as discussed above at 11-15, the July 1, 2008 NAA redemption was done at Ibbotson's direction and consistent with Nationwide's SEC disclosures and

contractual obligations to its VA/VL policyholders and Ibbotson, and thus Nationwide's actions were neither arhitrary nor unreasonable.

3. The NVIT MM Fee Structure

The Court's ruling that the NVIT MM's fee structure violated the implied covenant was erroneous. First, nothing in the PA or record evidence indicates that Nationwide would ever have agreed to cap the fees it charged. *See Nemec*, 991 A.2d at 1127 n.20. Second, there was no record evidence that the fee differential harmed NorthPointe or that Ibbotson directed the redemption from the NorthPointe NVIT based on a fee differential; indeed, NorthPointe's own expert, Ezra Zask, opined that "the difference [in the funds' fees] was not material," A1433.[7] Finally, the Court's ruling is inconsistent with its (correct) ruling that Nationwide's creation of the NVIT MM did not violate the implied covenant. Op. 12. If Nationwide could create a "competing" fund to the NorthPointe NVIT, it follows that it could create a fund with lower (*i.e,* competing) fees.

[7] Zask's testimony, from a deposition, was admitted at trial as part of an agreement that allowed NorthPointe to obtain a new expert, Professor Wermers, two weeks before trial. Zask had opined that the two funds were "identical in material [respects], including the expense ratios." A1434-35. Wermers, on whom the Court relied, took the diametrically opposing view.

IV. The Court Erred in Ruling That Nationwide's Refusal to Pay Termination Fees Violated The PA

A. Questions Presented

Whether the Court's interpretation of the negotiated performance standard was erroneous and whether the Court erred in relying on expert testimony as to both the interpretation of the standard and whether Nationwide breached it. Preserved: A313; A338; A357; A1576-77.

B. Standard of Review

The Court's interpretation of the PA is reviewed *de novo*. *See Alta*, 41 A.3d at 385. The Court's decision to admit expert testimony is reviewed for abuse of discretion. *Spencer v. Wal-Mart Stores East, LP*, 930 A.2d 881, 886 (Del. 2007).

C. Merits of The Argument

The Court ruled that NorthPointe met the Nationwide Standards in Schedule 2 to Exhibit D and was therefore entitled to termination fees. Of the five "criteria" for the "Nationwide Standards," the fourth (the "Standard") is relevant to this appeal. It reads: "*At all times*, [NorthPointe] 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. NorthPointe argued at trial, and the Court ruled, that the Standard should be measured "prospectively, not retroactively" (*i.e.*, Nationwide could not consider NorthPointe's performance before the PA's closing

date) and that "a period of three consecutive years" means three separate one-year periods in a row. Op. 28-29. Nationwide argued that the Standard covered NorthPointe's performance both before and after the closing date, and that "*a period* of three consecutive years" means *one* period of three consecutive years. It was undisputed that NorthPointe met the Standard under NorthPointe's interpretation hut failed the Standard under Nationwide's interpretation. A1517.

Although Nationwide acknowledged in its summary judgment briefing that the Standard, when viewed in isolation, might be susceptible to different interpretations, the italicized language from the Standard quoted above makes clear that the Standard can be measured *at any time* post-closing (and thus in part looks backward to NorthPointe's pre-closing performance) and that performance is measured by looking at *one* period (singular) of three consecutive years or five consecutive quarters. A203-04. That the Standard encompassed pre-closing performance is further confirmed by the fact that the "Restricted Period" for the termination provisions and other conditions set forth in Exhibit D expired three years after the closing. A1078. Thus, if "three consecutive years" is to have meaning, it must be the case that the evaluation period for the Standard covers pre-closing (as well as post-closing) performance; otherwise there would never be a date on which the Standard's three-year period could be measured. The Court's

ruling that the Standard "w[as] prospective, not retroactive" fails to give meaning to "three consecutive years" and "at all times," and its ruling that the Standard is measured by looking at three periods fails to give meaning to "a period." Accordingly, the Court's interpretation is erroneous. *See Alta*, 41 A.3d at 386.

Over Nationwide's objection, the Court admitted and adopted NorthPointe's expert opinions offered by Lawrence Simon and Richard Wermers as to the interpretation of the Standard and whether Nationwide violated it. A313; A338; A357; A1571-73; A1576-77; A1585-86. Moreover, the Court faulted Nationwide for "opt[ing] not to ask its own expert to opine on this question[.]" Op. 28. The Court noted in this regard that Nationwide's expert, Eric Sirri, whom the Court deemed "credible," testified

> that Nationwide and the [Fund] Board's review and process for evaluating performance was consistent with industry standards. *However, Sirri did not offer testimony about the negotiated performance standards and Sirri offered no opinion on whether NorthPointe violated the performance standards set forth in the contract. Sirri stated that he was not asked to form an opinion on this issue.*

Op. 28. Nationwide, however, did not ask Sirri to opine on these questions because the interpretation of the Standards and whether Nationwide violated them is not an appropriate subject for expert opinion under Delaware law. *See Farrell v. Univ. Del.*, 2009 WL 5176218, at *4 (Del. Super. Nov. 24, 2009) ("Delaware

law requires the exclusion of expert testimony that expresses a legal opinion"); *N. Am. Philips Corp. v. Aetna Cas. & Surety Co.*, 1995 WL 628447, at *3 (Del. Super. Apr. 22, 1995) (Delaware law "firmly prohibits expert testimony as to legal duties, standards or ramifications arising from a contract. Such testimony is reversible error and is not repaired by cross-examination."). The Court's admission and reliance on NorthPointe's expert opinions on these questions was reversible error.[8]

[8] Because NortPointe failed to meet the Nationwide Standards and Nationwide could terminate NorthPointe subadvisory agreeements without paying termination fees, Nationwide's failure to pay termination fees could not as a matter of law constitute a breach of the implied covenant. *See Nemec*, 991 A.2d at 1127 ("The implied covenant will not infer language that contradicts a clear exercise of an express contractual right.").

V. The Court's Damages Award Was Erroneous

A. Questions Presented

Whether the Court's damages award contains a mathematical error and whether the Court erred in admitting and relying on the testimony of NorthPointe's damages expert, Lawrence Simon? Preserved: A313; A566-69; A1576-77.

B. Standard of Review

Abuse of discretion. *Spencer,* 930 A.2d at 886.

C. Merits of The Argument

1. Even under NorthPointe's Damages Theory Adopted by The Court, The Damages Award Should be Reduced by $4,168,630

Assuming *arguendo* that the Court did not err in relying on Simon's testimony, the Court made a mathematical error that failed to account for the fact that Nationwide loaned NorthPointe $9 million of the purchase price. Simon himself acknowledged that any damages award had to account for the Note. A1594-95. The Court's error in adopting Simon's calculations, but neglecting to account for the entire $9 million Note, resulted in a damages award $4,168,630 greater than the award calculated by Simon.

The Court adopted Simon's damages "scenario" for an express breach of contract. Op. 57. Under this scenario, Simon calculated an overpayment of the purchase price of $11,980,000. A1585 (explaining calculation of "an overpayment

at the closing date of $11,980,000"); A1594 ("we start with the overpayment of the purchase price, 11 million 980"). The Court's finding that Simon "recalculated [an] overpayment of $13,472,528" is clearly erroneous. That figure is Simon's estimate of "Total Economic Loss." *See* A1376.

Simon opined that the "net cash owed to NorthPointe" for Nationwide's express breach of contract equaled **$6,738,243**. A1595. As he testified on direct examination: "[T]otal express damages [are] $15,738,243"[9] but "[t]he cash damage that NorthPointe would be entitled to . . . ***has to be reduced by the Nationwide note for a total damage [award] of 6 million 738,243"*** (*i.e,* $15,738,243 - $9,000,000 = $6,738,243). A1595. The Court adopted Simon's "total express damages" award except for $551,862 in direct costs, and held that NorthPointe was owed "15,186,381.00 in damages and termination fees." Op. 57. But the Court only reduced that amount by what it called the "revised note amount [of] $4,831,370," rather than the full $9 million amount of the Note. Op. 59. Thus the Court erred in not reducing the damages award by $4,168,630 (*i.e.,* $9,000,000 - $4,831,370 (the "revised note" amount)). The Court's confusion apparently

[9] Simon derived his Total Express Damages by adding Total Economic Loss ($13,472,528) plus Direct Costs ($1,659,930) plus termination fees for the NorthPointe Small Cap funds, the Micro Cap fund, and the Mid Cap Growth Fund ($605,785). A1362.

stemmed from the fact that Simon "revised" the Note in order to ascertain what the Note amount would have been (and what NorthPointe's interest payments would have been avoided) had the $25 million purchase price been reduced by the $11.98 million "overpayment." A1594-95. In any event, even Simon recognized that because Nationwide loaned NorthPointe $9 million to pay the purchase price, any damages award had to be reduced by that amount. Thus, even if this Court were not to reverse the Superior Court's opinion on any other ground, at the very least, the case should be remanded with directions to reduce the damages award by $4,168,630.

2. The Court Erred in Adopting NorthPointe's Damages Theory

For four reasons, the Court abused its discretion in adopting Simon's damages opinion. First, the Court adopted Simon's "express" damages scenario despite the fact that this scenario was premised on findings of contract breaches that the Court did not make and a finding of an implied covenant breach that the Court explicitly rejected. Simon's express breach scenario was based on breaches of §§4.4(c) and 6.6(b) of the PA, *see* A1366 and A1578; the Court, however, never made findings as to whether Nationwide breached these sections, which addressed pre-closing obligations. Moreover, Simon's express breach scenario was made "under the premise and assumption that Nationwide had knowledge on and prior to

the Closing Date of the transaction of its intent to establish a competing fund to the [NorthPointe NVIT]." A1374. The Court, however, expressly held that the creation of a competing fund did *not* constitute a breach of the implied covenant. Op. 12.

Second, Simon's damages calculation, using the discredited build-up method, *see In re Appraisal of the Orchard Enterprises, Inc.,* C.A. 2012 WL 2923305, at *2 (Del. Ch. July 18, 2012), is premised on the assumption that Merrill Lynch valued the NorthPointe enterprise at $25 million. A1376; A1601. But, as the Court noted, Merrill Lynch's valuation was in the range of *$53 to $60 million.* Op. 17. ***Thus, the fundamental assumption upon which Simon's damages theory was based is false.***

Third, Simon's damages analysis did not break down damages by breaches of individual sections of the PA or the implied covenant, and therefore there is no way to discern how much, if any, damages flowed from a breach of the obligation to market the funds or maintain the NorthPointe name on the two small cap funds. A1605. For this reason, NorthPointe's contract claims based on Nationwide's alleged failure to comply with those obligations fail as a matter of law. *See VLIW Tech., LLC v. Hewlett-Packard Co.,* 840 A.2d 606, 612 (Del.2003) (holding that the elements of a breach of contract claim include proof of resulting damages to

the plaintiff). Nor did Simon take into account the market crash of 2008, which occurred two weeks after the PA's closing, or the fact that 80% of NorthPointe's AUM was not housed in Nationwide-sponsored funds. A1603-04.[10]

Fourth, following Simon, the Court included in its damages award termination fees for the NorthPointe Small Cap Growth Fund and the NorthPointe Small Cap Value Fund. Op. 57-58. But the Court held that the PA's termination fee provision did not apply to these funds, and only applied to the Mid Cap Growth, Value Opportunities, Large Cap Value, and Micro Cap Equity funds. *See* Op. 54-55. As noted above, this holding cannot be reconciled with the plain language of §1(a); but if it were to be upheld, then the damages award should be reduced by the termination fees for the two NorthPointe-branded funds.

[10] The Court itself "acknowledge[d] the significant reduction in market valuation across all asset classes in October 2008[,]" and held that "[n]o evidence was presented at trial by which the Court could attribute any damages to the market crash rather than to Nationwide's breaches[.]" Op. 51n.71. The Court nonetheless adopted Simon's damages "scenario."

CONCLUSION

For the reasons stated above, the judgment of the Superior Court should be reversed and the case should be remanded with instructions to enter judgment in Nationwide's favor with respect to NorthPointe's claims alleged in the Third Amended Complaint and Nationwide's counterclaim and cross claims.

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