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

RYAN SWEENEY et al., **Plaintiffs,** **v.** **NATIONWIDE MUTUAL INSURANCE COMPANY et al.,** **Defendants.**	**Case No. 2:20-cv-1569** **Judge James L. Graham** **Magistrate Judge Chelsey M. Vascura**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

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INTRODUCTION & SUMMARY OF ARGUMENT

This case is a putative class action under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). It involves a 401(k) pension plan that Defendant Nationwide Mutual Insurance Company ("Nationwide Mutual") offers to its employees known as the Nationwide Savings Plan ("NSP"). Under the NSP, employees of Nationwide Mutual are given an opportunity to defer a portion of their salary into the NSP trust and any deferral is matched by Nationwide Mutual. The employees can invest such sums among a menu of investment options, one of which is known as the Guaranteed Investment Fund.

Defendant Nationwide Life Insurance Company ("Nationwide Life") is an indirect, wholly-owned subsidiary of Nationwide Mutual. Nationwide Life sells guaranteed investment contracts to retirement plans. Guaranteed investment contracts are aptly named: the insurance company declares an interest rate of return at various times on the funds it receives from the contract-holder, known as a crediting rate (*e.g.*, 3.5% or 4.5%). Upon a contract-holder's withdrawal of the investment, or termination of the contract, the insurance company guarantees payment of the principal amount that was paid in and the credited interest pursuant to the declared crediting rates.

As it relates to this case, the NSP acquired a guaranteed investment contract from Nationwide Life, and when Nationwide Mutual employees who participate in the NSP select the Guaranteed Investment Fund option, the net amounts they invest in such option are transferred to Nationwide Life pursuant to the terms of the guaranteed investment contract. The amounts earned pursuant to the declared crediting rates constitute the income earned under the contract and credited to the Guaranteed Investment Fund option. It is the alleged charges that Nationwide Life assesses against the investment yield in determining the crediting rates for the NSP's guaranteed investment contract that is the focus of the Amended Complaint.

Plaintiffs filed their initial complaint on March 26, 2020. Plaintiffs initially claimed the Defendants violated ERISA by wrongly defaulting certain NSP participants into the Guaranteed Investment Fund without their consent. They noted that Nationwide Mutual sponsors a traditional, defined benefit pension plan that also acquired a guaranteed investment contract from Nationwide Life, and they claimed the crediting rates on the NSP's guaranteed investment contract were artificially low relative to the crediting rates declared on the contract owned by the Nationwide defined benefit plan. They also asserted that Nationwide Life was required to declare crediting rates based on the investment return on its entire general account, and its failure to do so meant it was retaining exorbitant sums based on the "spread" between the total general account return and the crediting rate it granted the NSP.

Following the filing of the initial complaint, Nationwide Mutual affirmatively reached out to Plaintiffs and voluntarily engaged in a significant, pre-discovery disclosure of information, in an effort to convince them their pleaded claims had no merit and there were no viable claims that could be brought in connection with the operation of the guaranteed investment contract owned by the NSP. Defendants explained why each of Plaintiffs' pleaded theories were factually and legally erroneous.[1] But despite Nationwide's considerable efforts to convince Plaintiffs to voluntarily dismiss their case, they chose instead to file the Amended Complaint.

The Amended Complaint generally abandons the theories Plaintiffs previously pleaded and now trots out two new theories of liability.[2] First, Plaintiffs contend that the Defendants have

[1] Defendants conducted a similar effort in connection with a related case making very similar allegations – *Edwards v. Nationwide Mutual Life Insurance Company*, 2:20-cv-01525 (Mar. 24, 2020) – and on June 11, 2020, the plaintiffs in *Edwards* chose to voluntarily dismiss their action.

[2] The Amended Complaint, as did the initial complaint, names as Defendants Nationwide Mutual, Nationwide Life, and the Investment Committee of the NSP. It also names individuals who were members of the Investment Committee. The initial complaint also named as Defendants a committee of the Board of Directors of Nationwide Mutual, and an administrative committee that operates the NSP. But these two committees have been dropped as defendants in the Amended Complaint.

violated the terms of the NSP plan document. They assert that the NSP plan prohibits Defendants from paying "contract charges" assessed by Nationwide Life in connection with the NSP's guaranteed investment contract with "plan assets." They acknowledge that Nationwide Life performs services in operating the contract, and that it is reimbursed from the yield on the investments it acquires with money transferred from the NSP. Plaintiffs claim the reimbursements constitute "contract charges," and that the investments and the interest income yield constitute "plan assets" of the NSP, and therefore the Defendants are violating the terms of the NSP plan document by paying "contract charges" with "plan assets."

Second, Plaintiffs contend that Nationwide Life pays itself excessive compensation. But unlike the initial complaint, Plaintiffs no longer contend that Nationwide Life is keeping the "spread" between the return on all general account assets and the crediting rate it declares under the NSP's guaranteed investment contract. The **only** ground the Amended Complaint articulates for the excessive compensation allegation relates to a so-called "cost of capital charge." Because the NSP's guaranteed investment contract is a form of insurance, Nationwide Life must set aside its own capital to ensure it can meet its guarantee obligations if the investments it makes with the funds it receives from the NSP fall short of the required guarantee. Nationwide Life charges a fee against the investment yield on the investments used to determine the guarantee contract's crediting rate, in order to compensate itself for the opportunity cost of having to set aside capital. Plaintiffs baldly claim this opportunity cost charge is too high.

From these alleged wrongs, Plaintiffs plead a variety of ERISA fiduciary violations by Defendants, including a breach of the duty to follow plan documents, and the twin duties of prudence and loyalty. They also assert that the acquisition and holding by the NSP of the guaranteed investment contract violates several of the prohibited transaction rules of ERISA.

But Plaintiffs grasp at straws. Their current claims fare no better than the ones they recognized they had to jettison. None states a claim upon which relief can be granted, and the Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

1. As Defendants explain below, in 29 U.S.C. § 1101(c)(1), Congress charged the U.S. Department of Labor ("DOL") with promulgating regulations to determine the circumstances under which assets are deemed "plan assets" of a benefit plan acquiring an insurance policy in cases where the insurance policy is supported by assets in such insurer's general account. The DOL has issued such regulations, which provide that if an insurance policy sold to a benefit plan constitutes a "Transition Policy," the benefit plan's assets will **not** include any of the underlying assets of the insurer's general account that support the policy. 29 C.F.R. § 2550.401c-1(a)(2).

The guaranteed investment contract issued to the NSP is a Transition Policy for purposes of 29 C.F.R. § 2550.401c-1. Nationwide Life invests in various securities with monies transferred to it from the NSP's Guaranteed Investment Fund option, and holds such securities in its general account. As a matter of law, those investments and the yield on those investments are not "plan assets" of the NSP. Because they are not plan assets, the charges debited against the yield to derive crediting rates are not payments from plan assets. Even if Plaintiffs are correct that the charges debited against yield constitute "contract charges" under the terms of the NSP plan document, such contract charges are not being paid with plan assets. There can be no viable claim that the Defendants have violated the terms of the NSP. Moreover, because Nationwide Life's compensation is not paid with plan assets, the NSP cannot as a matter of law be expending assets to pay excessive compensation.

2. As Defendants further explain, there is an additional, independent reason why Plaintiffs' excessive compensation claim fails. Plaintiffs do not satisfy the pleading requirements of *Ashcroft*

v. Iqbal, 556 U.S. 662, 678 (2009). Courts in 401(k) fee cases hold that whether participants are directly or indirectly paying excessive fees must be determined by a "market standard." Here, Plaintiffs must plead that the total amounts Nationwide Life subtracts against the investment yield to determine crediting rates are **greater** than market – that is, they are higher than what other commercial insurance companies would charge for their guaranteed investment products. Plaintiffs also must plead that these higher-than-market charges have resulted in lower-than-market crediting rates on the contract – that is, that the returns NSP participants receive on their Guaranteed Investment Fund option are lower than what they would receive if Defendants had selected a contract from a Nationwide Life competitor.

But Plaintiffs plead none of these required facts (nor, frankly, can they). The Amended Complaint merely alleges that the cost of capital charge was excessive, and even as to that claim they fail to provide any logical explanation of why. Plaintiffs do not allege that overall charges failed to meet a market standard of what other commercial insurers charge on similar contracts, nor that the declared crediting rates fall below what other competitors offer for similar products. The excessive fee claim thus fails to satisfy *Iqbal*, because it does not plead key facts necessary for a violation of ERISA's prudence, loyalty and self-dealing rules in this context.

3. Finally, as Defendants explain, Plaintiffs' prohibited transaction claims fail too. ERISA provides blanket immunity for companies whose insurance company affiliates issue contracts to such companies' benefit plans. 29 U.S.C. § 1108(b)(5). That statutory defense is at the heart of the Amended Complaint, and Plaintiffs' duty to plead plausible prohibited transaction claims requires them to plausibly plead that the statutory immunity Congress granted is inapplicable. But Plaintiffs fail completely to plead that the statutory immunity does not apply.

For all of these reasons, this Court should dismiss Plaintiffs' Amended Complaint.

BACKGROUND & ALLEGATIONS OF THE COMPLAINT

Nationwide Mutual is an Ohio company that provides insurance and financial services. (Am. Compl., ¶ 16, ECF No. 26, PageID 96.) Nationwide Mutual sponsors the NSP, which is an individual account, defined contribution form of pension benefit plan, for its employees. (Am. Compl., ¶¶ 17, 35-37, ECF No. 26, PageID 96, 99.) Nationwide Life is a stock-based life insurance company organized and regulated under Ohio law, and is owned by Nationwide Financial Services, Inc., which itself is an indirect subsidiary of Nationwide Mutual. (Am. Compl., ¶ 30, ECF No. 26, PageID 98-99.) The NSP is a tax-qualified form of benefit plan in accordance with section 401(k) of the Internal Revenue Code. (Am. Compl., ¶ 38, ECF No. 26, PageID 100.) It is funded by employees' voluntary, tax-deferred contributions and Nationwide Mutual's own matching contributions. (Am. Compl., ¶ 38, ECF No. 26, PageID 100.)

The NSP is established and maintained pursuant to a written instrument. (Am. Compl., ¶ 44, ECF No. 26, PageID 100.) The NSP offers participating employees a variety of options to invest their individual account funds. (Am. Compl., ¶ 39, ECF No. 26, PageID 100.) The Investment Committee of the NSP has the authority to manage the assets of the NSP, and is responsible for selecting and monitoring the various investment options. (Am. Compl., ¶¶ 23, 26, ECF No. 26, PageID 97-98.) One of the investment options selected and maintained by the Investment Committee is called the Guaranteed Investment Fund. (Am. Compl., ¶ 48, ECF No. 26, PageID 101.) The Guaranteed Investment Fund is the most popular investment option in the NSP. As of December 31, 2018, approximately 30% of the NSP's total value was invested in the Guaranteed Investment Option. (Am. Compl., ¶ 50, ECF No. 26, PageID 101.)

In 1975, the trustees of the NSP acquired a guaranteed investment contract known as GA-P L941 issued by Nationwide Life ("Contract GA-P L941"). That contract was restated in

September 2002. (GA-P L941, cover page, ¶ 1.14.)[3] Contract GA-P L941 is an experience-rated contract, meaning that the value of the contract is based on the actual investment experience of the amounts provided to Nationwide Life pursuant to the contract and invested by Nationwide Life, less expenses and other compensation, if any. (GA-P L941, cover page, ¶ 6.7.) Under this contract, Nationwide Life credits interest on the amounts it receives at an interest crediting rate which it declares. (GA-P L941, cover page, ¶ 3.3.) The interest crediting rate is declared quarterly and is expressed as an annualized rate of return that Nationwide Life credits under the contract. (Am. Compl., ¶ 58, ECF No. 26, PageID 102-03.) Contract GA-P L941 is treated as a guaranteed investment contract because the total value of the contract, based on the net principal amounts transferred to Nationwide Life and the declared quarterly interest crediting rate amounts (less any distributions), "are fixed and are guaranteed as to dollar amount." (GA-P L941, cover page.)

When an NSP employee elects to invest in the Guaranteed Investment Fund option, the amounts designated for such option are transferred to Nationwide Life, and are invested by Nationwide Life in a diversified portfolio largely of corporate bonds, other fixed income securities, and mortgages. (NSP Enrollment Guide, at p. 12.)[4] Those investments are "maintained in

[3] Contract GA-P L941, as restated September 2002, is attached hereto as Ex. 1 to the Declaration of Dustin Koenig in Support of Defendants' Motion to Dismiss. As noted, the central allegation in the Amended Complaint is that the Defendants have violated ERISA by continuing to have the NSP hold Contract GA-P L941, and have engaged in ERISA violations in connection with the charges assessed against the investment return on the investments under such contract. Courts in this Circuit routinely consider such a central document, repeatedly referred to in the operative complaint, in evaluating a motion to dismiss. *See, e.g.*, *Malaney v. AT&T Umbrella Benefit Plan No. 1*, 2:10-CV-401, 2010 WL 5136206, at *2 (S.D. Ohio Dec. 9, 2010) ("[t]he court may . . . consider a document or instrument which is attached to the complaint, or which is referred to in the complaint and is central to the plaintiff's claim" in deciding a motion to dismiss) (Graham, J.) (citations omitted); *see also Bon-Ing Inc. v. Hodges*, 2:16-cv-710, 2016 WL 6680813, at *2 (S.D. Ohio Nov. 14, 2016) (Graham, J.) (citing *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008)).

[4] The NSP Enrollment Guide for participating employees is attached hereto as Ex. 2 to the Declaration of Dustin Koenig in Support of Defendants' Motion to Dismiss. The Enrollment Guide provides important background information on the NSP and the Guaranteed Investment Fund, and summarizes for participants certain key information about Contract GA-P L941. It is a document that helps "fill in the contours and details of a complaint," and this Court has acknowledged that "such materials may be considered without converting [a] motion to dismiss to one for summary judgment." *Bon-Ing*, 2016 WL 6680813, at *4 (quoting *Yeary v. Goodwill Indus.-Knoxville, Inc*., 107 F.3d 443, 445 (6th Cir. 1997)); *see also Qiu v. Univ. of Cincinnati*, 803 F. App'x 831, 834 (6th Cir. 2020) (quoting *Yeary*, 107 F.3d at 445).

[Nationwide Life's] general account." (Am. Compl., ¶ 52, ECF No. 26, PageID 102.)[5] The crediting rate that Nationwide Life declares quarterly on Contract GA-P L941 is based on the investment yield on these instruments that Nationwide Life has acquired with net amounts received from the Guaranteed Investment Fund. In operating Contract GA-P L941, Nationwide Life provides custodial, actuarial, investment and accounting services. (Am. Compl., ¶ 62, ECF No. 26, PageID 103.) To determine the quarterly crediting rates, Nationwide Life reduces from the amount of investment yield on the portfolio of debt instruments and mortgages it acquires the value of the services it provides. (Am. Compl., ¶ 64, ECF No. 26, PageID 104.)

As an issuer of an insurance contract, National Life is required to "set aside" a portion of its own capital to ensure it can "meet its [contracted-for guarantee] obligations." (Am. Compl., at ¶ 66, ECF No. 26, PageID 104.) As part of the deductions from the investment yield to determine the crediting rate, Nationwide Life also includes a fee for the opportunity cost of having "to set aside [and not invest as it otherwise would] an amount of [its own] capital." (Am. Compl., ¶ 66, ECF No. 26, PageID 104.)

The NSP plan document provides that certain forms of expenses in connection with the administration and operation of the plan are not eligible to be paid with plan assets. (Am. Compl., ¶ 47, ECF No. 26, PageID 101.) The NSP plan document further provides that expenses not eligible to be paid with plan assets include "contract charges under the Insurance Contract related to the Guaranteed Investment Fund." (Am. Compl., 47, ECF No. 26, PageID 101.)

[5] "The general account of an insurance company is the operating account — it includes all the funds available to conduct business activities and pay expenses. . . . The general account is available to satisfy all of an insurance company's obligations to all of its policy holders as well as its creditors." Insured Arrangements, 3 Compensation and Benefits § 31:59 (2020); *see also* Pension and Deferred Compensation Guide ¶ 9150 (2020) ("'General accounts' are all assets of an insurance company that are not legally segregated and allocated to separate accounts. The assets in such accounts can be commingled with the insurance companies' own funds.").

Based on this background, Plaintiffs make the following claims:

1. Conduct Inconsistent with the Plan Document. Plaintiffs assert that the amounts that are deducted from the investment yield on Contract GA-P L941 to reimburse Nationwide Life for services, including its cost of capital charge, constitute "contract charges" as that term is used in the NSP plan. They further contend that the investment yield from which such deductions are made are "plan assets" of the NSP, and consequently the use of such plan assets to reimburse Nationwide Life contravenes the terms of the NSP plan document. Plaintiffs claim that by allowing such conduct, and by Nationwide Mutual failing to directly reimburse Nationwide Life for the latter's services, Defendants Nationwide Mutual, the Investment Committee, and its members, all breached their twin duties of prudence and loyalty under 29 U.S.C. § 1104(a)(1)(A)-(B), as well as their fiduciary duty to act "in accordance with the documents" governing the NSP under 29 U.S.C. § 1104(a)(1)(D). (Am. Compl., Count I ¶¶ 91.a, 91.b, 92.a, ECF No. 26, PageID 110-11.)

2. Excessive Compensation. Plaintiffs assert that the amounts Nationwide Life deducts from the investment yield on Contract GA-P L941 to reimburse itself for services on the contract, including its cost of capital charge, are excessive. (Am. Compl., ¶ 73, ECF No. 26, PageID 106.) They claim that such excessive reimbursement also indirectly benefits Nationwide Mutual, to the detriment of the NSP's participants, and that this constitutes self-dealing. (Am. Compl., Count I ¶¶ 91.c, 92.b, 92.c, ECF No. 26, PageID 110-11.) They assert such payment of excessive fees has caused Defendants Nationwide and the Investment Committee also to breach their twin duties of prudence and loyalty under 29 U.S.C. § 1104(a)(1)(A)-(B). They further claim that by virtue of this conduct all Defendants violated the anti-inurement rule of 29 U.S.C.

§ 1103(c)(1), which in pertinent part holds that plan assets shall "never inure to the benefit of an employer." (Am. Compl., Count IV, ECF No. 26, PageID 17-18.)

3. Prohibited Transactions. Plaintiffs assert that as the employer that sponsors the NSP, Nationwide Mutual is a party in interest to the NSP under 29 U.S.C. § 1002(14)(C). (Am. Compl., Count II ¶ 101, ECF No. 26, PageID 112.) They also assert that Nationwide Life is a party in interest to the NSP under the same provision of ERISA. (Am. Compl., Count II ¶ 102, ECF No. 26, PageID 113.) They claim that each periodic transfer of plan assets from the Guaranteed Investment Fund to Nationwide Life pursuant to Contract GA-P L941 was a transfer to and use of plan assets by a party in interest prohibited under 29 U.S.C. § 1106(a)(1)(D), (Am. Compl., Count II ¶¶ 104, 112, ECF No. 26, PageID 113-14), and that each reimbursement payment to Nationwide Life was also a furnishing of services by a party in interest prohibited under 29 U.S.C. § 1106 (a)(1)(C) (Am. Compl. Count II ¶¶ 103,111, ECF No. 26, PageID 113-14). Finally, Plaintiffs claim the operation of Contract GA-P L941 and receipt of compensation by Nationwide Life constitutes self-dealing prohibited transactions under 29 U.S.C. §§ 1106(b)(1) and (b)(3). (Am. Compl., Count III ¶¶ 123-24, ECF No. 26, PageID 115-16.)

ARGUMENT

I. The Applicable Legal Standard Under Federal Rule Of Civil Procedure 12(b)(6)

In considering whether a complaint fails to state a claim upon which relief can be granted, the Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 835 (6th Cir. 2012) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). But the pleading must still contain facts sufficient to "provide a plausible basis for the claims in the complaint"— a recitation

of facts intimating the "mere possibility of misconduct" will not suffice. *Flex Homes, Inc. v. Ritz–Craft Corp. of Mich., Inc.*, 491 F. App'x 628, 632 (6th Cir. 2012); *Iqbal*, 556 U.S. at 679; *see also Braun v. Coulter Ventures, LLC*, No. 2:19-cv-5050, 2020 WL 5909004, at *4 (S.D. Ohio Oct. 5, 2020) (Marbley, J.).

Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, [also] do not suffice." *Iqbal*, 556 U.S. at 678; *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 557 (2007) ("labels and conclusions" or a "formulaic recitation of the elements of a cause of action's elements will not do," nor will "naked assertion[s]" devoid of "further factual enhancements"). The factual allegations must be enough to raise the claimed right to relief above the speculative level. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555-56.

To survive a motion to dismiss, the "complaint must contain either direct or inferential allegations respecting *all material elements* necessary to sustain a recovery under some viable legal theory." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005) (emphasis added). The inquiry as to the plausibility of a claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]'– 'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)); *see also Akatobi v. Aldi, Inc.*, 2:09-cv-1028, 2010 WL 1257614, at *2 (S.D. Ohio Mar. 31, 2010) (Graham, J.).

II. The Defendants Did Not Breach Any ERISA Fiduciary Duty In Allowing Nationwide Life To Obtain Reimbursement For Services On Contract GA-P L941, Because The Investments Nationwide Life Makes With The Amounts Received From The NSP's Guaranteed Investment Fund And Holds In Its General Account Are Not Plan Assets

Plaintiffs plead that the NSP plan document prohibits "contract charges" on Contract GA-P L941 to be paid with plan assets, and that when Nationwide Life is reimbursed for services in

managing that contract by reducing the investment yield on the investments that determine the quarterly crediting rate, such reimbursement results in contract charges being paid with plan assets. For purposes of this motion, Defendants will assume that Plaintiffs are correct in their interpretation of the operative language of the NSP plan, and that the reimbursement amounts deducted from investment yield are "contract charges" as that term is used in the NSP plan document.[6] Nonetheless, even assuming Plaintiffs' construction of the relevant NSP plan language is correct, their theory still hinges on whether reimbursement is actually made with plan assets. As a matter of law, the reimbursement is not made with plan assets, because GA-P L941 satisfies a DOL regulatory safe harbor which holds that for certain insurance company general account contracts, the assets held in the insurer's general account supporting such contracts will not be deemed to be ERISA plan assets.

1. Contract GA-P L941 Is A Transition Policy In Accordance With 29 C.F.R. § 2550.401c-1, And The Investments That Determine The Crediting Rate Are Not Plan Assets

Title 29 U.S.C. § 1101(b)(2) provides that, in the case of a benefit plan to which a "guaranteed benefit policy" is issued, the assets of the plan shall not include any assets of the insurer that issues such policy. In *John Hancock Mut. Life Ins. Co v. Harris Trust & Sav. Bank*, the Supreme Court held that not all insurance policies supported by collateral within an insurance company's general account are "guaranteed benefit policies." *See* 510 U.S. 86 (1993). In the wake of *Harris Trust*, Congress amended 29 U.S.C. § 1101 by adding a new subsection, § 1101(c). 29 U.S.C. § 1101(c)(1)(A) charged the DOL with a duty to issue regulations "for the purpose of

[6] The Defendants are confident that Plaintiffs misconstrue this language in the NSP plan, and that "contract charges" do not relate to the deductions from investment yield to determine the crediting rate, nor that the plan document prohibits reimbursement to Nationwide Life **with** plan assets. But the record necessary for construing or applying this plan language is not appropriately presented on a Rule 12(b)(6) motion, and thus Defendants reserve their rights on such defense.

determining, in cases where an insurer issues . . . policies to or for the benefit of an employee benefit plan . . . and such policies are supported by assets of such insurer's general account[], which assets held by the insurer . . . constitute assets of the plan."

The DOL issued the regulations required by § 401(c)(1)(A) in final form in January of 2000. *See* 65 Fed. Reg. 614 (Jan. 5, 2000). The regulations, at 29 C.F.R. § 2550.401c-1, provide that if an employee benefit plan has acquired a "Transition Policy," the plan's assets include the Transition Policy "but do not include any of the underlying assets of the insurer's general account" if certain conditions are satisfied. 29 C.F.R. § 2550.401c-1(a)(2). For such purposes, a Transition Policy is a "contract of insurance" that is issued by an insurer to a benefit plan "on or before December 31, 1998," and which is supported by the assets of the insurer's general account. 29 C.F.R. § 2550.401c-1(h)(6)(i). And for such purposes, a policy "will not fail to be a Transition Policy merely because the policy is amended or modified." 29 C.F.R. § 2550.401c-1(h)(6)(ii). Contract GA-P L941, although amended and restated in 2002, was issued to the NSP in 1975, the investments made under the policy are held in Nationwide Life's general account, and the entirety of Nationwide Life's general account assets support the contract's guarantee. *See supra* pp. 6-8. Contract GA-P L941 therefore meets the definition of a Transition Policy.

The conditions an insurer that issues a Transition Policy needs to satisfy to obtain the safe harbor protection of 29 C.F.R. 2550.401c-1 fall into four categories:

- An insurer needs to have made certain initial disclosures to the benefit plan about the financial and other terms of the Transition Policy, as well as about certain alternatives to the policy. 29 C.F.R. § 2550.401c-1(c)(3) (initial disclosures), 29 C.F.R. § 2550.401c-1(d) (disclosures of alterative arrangements). These disclosures need to be made on or before July 5, 2000. 29 C.F.R. § 2550.401c-

1(j)(2). Attached hereto is a Declaration of John M. Towarnicky that attests to Nationwide Life making the requisite initial disclosure and disclosure of alternative arrangements to the NSP, and a true and correct copy of an excerpt from the Nationwide Life Administrator Reference Manual that also states that such disclosures were timely made to benefit plans holding pre-December 31, 1998 policies. (Towarnicky Decl. Ex. 1.)[7]

- An insurer needs to make annual disclosures to the benefit plan about the Transition Policy, including about the balance of the value of the policy (known as the accumulation fund), the rate of return under the policy, benefits paid from the policy, and other information. Attached hereto as Exs. 3(A)-3(G) to the Declaration of Dustin Koenig are true and correct copies of such annual disclosures in connection with Contract GA-P L941 during each year within the purported class period pleaded by Plaintiffs.[8]

- In connection with a Transition Policy issued by an insurer wholly-owned by the employer that maintains the employee benefit plan, the statutory immunity from the prohibited transaction rules set forth in 29 U.S.C. § 1108(b)(5) must apply. 29 C.F.R. § 2550.401c-1(b)(2)(ii). *See* discussion *infra* pp. 21-24 regarding that statutory immunity.

[7] Because the Amended Complaint is exclusively focused on alleged ERISA fiduciary misconduct relating to Contract GA-P L941, and the initial disclosure required under the DOL regulations exclusively relates to and provides information about that contract, the Declaration of John Towarnicky and the Nationwide Administrator Reference Manual excerpt attached to his Declaration help "fill in the contours and details of a complaint," and may be considered in this motion. *See Bon-Ing*, 2016 WL 6680813, at *2; *supra* note 4.

[8] Similarly, the true and correct copies of the last six years of annual disclosures are documents that help "fill in the contours and details of a complaint," and may be considered in this motion. *See Bon-Ing*, 2016 WL 6680813 at *2; *supra* note 4.

- The policy must have certain termination procedures. Specifically, the Transition Policy must allow the policyholder to terminate or discontinue the Transition Policy and "elect to receive without penalty," one of two forms of withdrawals. 29 C.F.R. § 2550.401c-1(e). The first form is a lump sum payment representing the unallocated balance of the value of the policy, which may include a market value adjustment. 29 C.F.R. § 2550.401c-1(e)(1). The second form is "a book value payment" of such amounts "in approximately equal annual installments over a period of no longer than 10 years." 29 C.F.R. § 2550.401c-1(e)(2). If the policyholder chooses the second option, interest must also be credited. *Id*. Section 3.5(b) of GA-P L941 (*see* Koenig Decl. Ex. 1) allows the NSP to withdraw the entire amount of the market value of the policy within 90 calendar days following a written request. Section 3.5(a) of GA-P L941 allows the NSP to elect to receive approximately equal annual withdrawals of the book value of the contract over a period of no more than seven years. In such circumstance Nationwide Life credits interest on the payments. (*See* Section 3.6 of GA-P L941.)

Accordingly, Nationwide Life has structured and administered Contract GA-P L941 in a manner to satisfy the requirements of the general account safe harbor regulation 29 C.F.R. § 2550.401c-1. The relevant consequence is that the underlying investments that Nationwide Life acquires with money provided to it from the NSP under Contract GA-P L941 are not plan assets of the NSP. Concomitantly, the investment income earned on such investments are not plan assets of the NSP. Thus, any deductions or charges against such investment income to reimburse or compensate Nationwide Life cannot be payments made with plan assets. To the extent, as Plaintiffs contend, that the NSP plan document forbids use of plan assets to reimburse or

compensate Nationwide Life, no such plan violation has occurred. Therefore, the portions of Count I of the Amended Complaint alleging breaches of the duty of prudence, loyalty and fealty to plan documents based on such allegedly improper use of plan assets must therefore be dismissed. (Am. Compl., Count I ¶¶ 89, 90, 91.a, 91.b, 92.a, ECF No. 26, PageID 110-11.)

Similarly, Plaintiffs' allegation that the Defendants have violated their fiduciary duties by allowing Nationwide Life to obtain "excessive" compensation must be dismissed. Plaintiffs' contention is that plan assets are being used to excessively compensate Nationwide Life. (Am. Compl., ¶ 73, ECF No. 26, PageID 106.) Given that the alleged compensation is not being paid with assets, there can be no valid claim of imprudence or disloyalty relating to the compensation of Nationwide Life. Therefore, the portions of Count I of the Amended Complaint alleging fiduciary breaches of prudence and loyalty based on use of NSP assets to pay excessive compensation must therefore be dismissed. (Am. Compl., Count I ¶¶ 91.c, 92.b, 92.c, ECF No. 26, PageID 110-11.)

Plaintiff's self-dealing claims also must be dismissed. Plaintiffs allege that Nationwide Life's exercise of discretion to pay itself compensation, which it claims also constitutes an indirect benefit to Nationwide Mutual, amounts to "deal[] with the assets of the [NSP] plan . . . for [its] own account," and prohibited gain by a party "in connection with a transaction involving the assets of the plan," in violation of the prohibited transaction rules of 29 U.S.C. § 1106(b)(1) and § 1106(b)(3) (Am. Compl., Count III ¶¶ 121, 122, ECF No. 26, PageID 115), and the duty of loyalty rule of 29 U.S.C. § 1104(a)(1)(A) (Am. Compl., Count I ¶ 92.c, ECF No. 26, PageID 111). But because any such reimbursements are not made from plan assets there can be no such violations, and therefore both the self-dealing portion of Count I and all of Count III must fall. Finally, the anti-inurement claim – Count IV – also falls. 29 U.S.C. § 1103(c)(1) prohibits "the

assets of a plan" from inuring to the benefit of an employer. Under the straightforward text of that provision, no violation occurs if the property allegedly inuring to Nationwide Life, and indirectly to Nationwide Mutual, does not constitute plan assets. *See Bottle Beer Drivers, Warehouseman & Helpers Teamsters Local 843 v. Anheuser Busch Inc.*, 96 F. App'x 831, 836 (3d Cir. 2004) (plaintiff "cannot maintain its § 1103(c)(1) claim against the company because its payments were not plan assets").

III. Plaintiffs' Claim Of Wrongful And Excessive Compensation Must Be Dismissed For The Independent Reason That They Have Failed To Adequately Plead Such Claims

Plaintiffs acknowledge in the Amended Complaint that Nationwide Life provides a variety of services in connection with the operation of Contract GA-P L941, including custodial, actuarial, investment and accounting services. (Am. Compl., ¶ 62, ECF No. 26, PageID 103.) Plaintiffs recognize that Nationwide Life is reimbursed for these services through deductions taken against the investment yield used to derive Contract GA-P L941's quarterly crediting rates. Yet in a naked and conclusory fashion, they repeatedly assert that the amounts reimbursed to Nationwide Life constituted excessive and unwarranted compensation. (*E.g.*, Am. Compl. ¶ 73, ECF No. 26, PageID 106.)

The Amended Complaint says nothing about **why or in what manner** the reimbursed or compensated amounts are excessive. Indeed, Plaintiffs do not even allege what amounts Nationwide Life receives in reimbursement for the services it provides. The only component of the alleged compensation of which Plaintiffs make any mention is Nationwide Life's cost of capital charge. But that charge is intended to make Nationwide Life whole for projected lost income on the amount of its own capital that it must set aside under Contract GA-P L941 to ensure there will be sufficient assets to meet its guarantee. (Am. Compl., ¶ 66, ECF No. 26, PageID 104.) And

even as to that claim, Plaintiffs fail to identify and plead any basis or benchmark against which the fee could be adjudged too high.

More broadly, there are no allegations in the Amended Complaint about the total reimbursement that Nationwide Life receives in connection with Contract GA-P L941, either on an annual, quarterly or other basis. And there are no allegations about how such compensation compares with the compensation that other commercial insurance carriers charge on the guaranteed investment contracts they offer in the ERISA retirement plan market.

Moreover, while Plaintiffs contend that the reimbursement Nationwide Life receives from the investment yield reduces the resulting crediting rate, and thus the return on NSP participants' investments, Plaintiffs fail to plead whether the reimbursement has resulted in crediting rates that are in fact lower than the crediting rates other commercial insurers offer in the market. In other words, despite the assertion that the Investment Committee breached their duties of prudence and loyalty by allowing the NSP to hold a contract that provides allegedly excessive compensation to Nationwide Life, Plaintiffs fail to allege that if the Investment Committee had eschewed Contract GA-P L941 they would have found a better one.

These significant pleading omissions cause the Amended Complaint to fail to meet the required pleading standards, and consequently the breach of fiduciary prudence and loyalty claims in Count I relating to allegedly excessive compensation fail for this independent reason. (Am. Compl., Count I ¶¶ 91.c, 92.b, 92.c, ECF No. 26, PageID 110-11.)

In recent years, courts hearing fiduciary breach cases concerning allegedly excessive fees paid by 401(k) plans have made clear that the determination of excessive fees must be made based on a market comparison – that is, what the market would charge for such services. In the absence of a plausible allegation that the fiduciary-defendant caused the 401(k) plan to enter into an

arrangement that was worse than what such fiduciary could have obtained in the market had it acted prudently, the court cannot determine whether on the face of such complaint the fiduciary acted imprudently, or disloyally. In the instance of such a failure, the Court cannot determine whether the claim is plausible, as required by *Ashcroft v. Iqbal,* and such claims are routinely dismissed.

A good recent example is *Patterson v. Morgan Stanley*, No. 16-CV-6568, 2019 WL 4934834 (S.D.N.Y. Oct. 7, 2019). In *Patterson*, the plaintiffs, participants in defendants' 401(k) plan, brought various fiduciary breach claims, including a challenge to six proprietary Morgan Stanley mutual fund options, alleging all six funds "charged fees that were improperly high." *Id*. at *2, *8 (claiming breaches of prudence and duty of loyalty by "charging higher advisory and administrative fees to the Plan than it charged to 'separate account clients'"). The court had no problem dismissing the excessive fee claim under Rule 12(b)(6), because the complaint failed to properly allege the fees were above those found in the market. It reasoned:

> "[s]pecifically, Plaintiffs assert that the fund charged a 0.93% fee in 2014 . . . *but do not explain how that fee fit into the marketplace or whether any comparable fund charged a lower rate*. Without more detail, Plaintiffs have failed to allege that the [fund fee] was inappropriately priced or that Defendants acted imprudently by retaining [such fund]."

Id. at *12 (emphasis added).

The recent decision in *Kong v. Trader Joe's Co.*, No. CV 20-05790, 2020 WL 5814102, *5 (C.D. Cal. Sept. 24, 2020) was similar. The court granted defendant's motion to dismiss because plaintiff failed to allege why the 401(k) plan's recordkeeping fee was excessive, or provide "any facts as to what would constitute a reasonable fee." *Id.* In doing so that court noted that "[c]ourts regularly dismiss imprudence claims such as these for failing to allege an adequate market comparison." *Id.*; *see also Laboy v. Bd. of Trs. of Bldg. Serv. 32 BJ SRSP*, No. 11 Civ. 5127, 2012 WL 701397, *3 (S.D.N.Y. Mar. 6, 2012) (granting defendant's motion to dismiss

because plaintiff "[i]n stating his claim for excessive administrative expenses, provides the amounts of these expenses, but he fails to compare them to those of comparable funds"); *Scott v. Aon Hewitt Fin., Advisors, LLC*, No. 17 C 679, 2018 WL 1384300, at *11 (N.D. Ill. Mar. 19, 2018) (dismissing breach of fiduciary duty and prohibited transaction claim of excessive fees paid to certain record-keepers and investment advisors, holding that plaintiff's "conclusory allegation that the compensation at issue 'constitutes excessive and unreasonable compensation'" was not enough to raise the right to relief above the speculative level); *Bekker v. Neuberger Berman Grp. LLC*, No. 16 CV 6123, 2018 WL 4636841, at *7 (S.D.N.Y. Sept. 27, 2018) (granting motion to dismiss excessive fee claim because plaintiff failed to make "specific allegations that the fund in question charged high fees in relation to a comparable fund [to] support . . . their conclusions"); *Dorman v. Charles Schwab Corp.*, No. 17-cv-00285, 2019 WL 580785, at *5 (N.D. Cal. Feb. 8, 2019) ("Plaintiffs must generally plead facts showing more than just high fees to show that defendants were imprudent in selecting certain funds.").

To be sure, Plaintiffs allege that Nationwide offered a guaranteed investment product to "unaffiliated retirement plans that guaranteed a minimum crediting rate of 3.5%," noting that during certain recent quarters the crediting rate on Contract GA-P L941 has been lower. (Am. Compl., ¶¶ 68-69, ECF No. 26, PageID 105-06.) The allegation implies that an ERISA fiduciary offering one of its products to its own 401(k) plan has a duty to provide the best performing or lowest cost product. That is not the law. *See Patterson*, 2019 WL 4934834, at *6 (dismissing excess fee claim, stating that "nothing in ERISA requires [a plan sponsor] to unilaterally offer [its] participants a discounted fee" as to its own fund products, or to "reduce the market-based fees . . . to equal those charged to [other] clients"); *see also Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 824 (8th Cir. 2018) (affirming Rule 12(b)(6) dismissal of fiduciary breach claim alleging that a

401(k) plan's "target date" funds charged higher fees and underperformed compared to Vanguard products, holding that "the existence of a cheaper fund does not mean that a particular fund is too expensive *in the market generally* or that it is otherwise an imprudent choice . . . [a]ny other conclusion would exempt ERISA plaintiffs … from pleading benchmarks for the funds"); *In re Honda of Am. Mfg., Inc. ERISA Fees Litig*., 661 F. Supp. 2d 861, 867 (S.D. Ohio 2009) (dismissing plaintiffs' claim of fiduciary breach based on a failure to leverage the plan's size to negotiate lower fees, stating that "[t]his Court . . . concludes that nothing in ERISA requires [defendants] . . . to search the market to find and offer the cheapest possible fund").

In sum, a required element of a claim of ERISA fiduciary imprudence or disloyalty for excessive fee payments requires a plausible allegation that the fees are too expensive relative to the **comparable** market. At the least, a reasonable benchmark must be identified and a failure to satisfy it must be pleaded. The Plaintiffs have not done so here. Their excessive compensation claim must be dismissed. (Am. Compl., Count I ¶¶ 91.c, 92.b, 92.c, ECF No. 26, PageID 110-11.)

IV. Plaintiffs Have Failed To Adequately Plead Their Prohibited Transactions Claims

ERISA provides an express and blanket immunity from the prohibited transaction rules for insurance companies that sell policies or contracts to the employee benefit plans that such insurer or its corporate parent sponsors. Specifically, 29 U.S.C. § 1108(b)(5) allows a fiduciary to acquire and hold for a benefit plan (1) "[a]ny contract for life insurance, health insurance, or annuities," (2) from an insurer that is "maintaining the plan," or which is a party in interest that is wholly-owned directly or indirectly by the "employer maintaining the plan," (3) "which [is] qualified to do business in a State," (4) if total premiums written on the policies for the employer's own plans do not exceed 5% of the total premiums written on all lines of insurance for the year, and finally

(5) "if the plan pays no more than adequate consideration." The § 1108(b)(5) exemption covers all forms of prohibited transactions, whether under 29 U.S.C § 1106(a) or the self-dealing provisions of 29 U.S.C § 1106(b). *See Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562, 568 n.4 (11th Cir. 1994); *Dupree v. Prudential Ins. Co.*, No. 99-8337-Civ.-JORDAN, 2007 WL 2263892, at *2 (S.D. Fla. Aug. 10, 2007). Congress enacted §1108(b)(5) for the obvious reason that it recognized "it would be contrary to normal business practice to require the plan of an insurance company to purchase its insurance from another insurance company." ERISA Joint Conf. Comm. Report, H.R. Conf. Rep. No. 93-1280 (Aug. 12, 1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5094; *see also Sellers v. Anthem Life Ins. Co.*, 316 F. Supp. 3d 25, 35 (D.D.C. 2018).

The Amended Complaint recognizes that Contract GA-P L941 "is a [form of] benefit-responsive group annuity contract," thus satisfying the first requirement laid out above (Am. Compl., ¶ 52, ECF No. 26, PageID 102.) The Amended Complaint also makes clear that Nationwide Mutual is the employer that sponsors the NSP, that it indirectly wholly owns Nationwide Life, and that Nationwide Life is a party in interest to the NSP and an insurance company licensed in the state of Ohio, thus satisfying the second and third requirements of 29 U.S.C. § 1108(b)(5) laid out above. (Am. Compl., ¶¶ 17, 30, 101, 102, ECF No. 26, PageID 96, 98-99, 112-13.) Most crucially, and as mentioned above, the Amended Complaint alleges in conclusory fashion that the compensation Nationwide Life received under the contract is excessive. To the extent that such assertion implies that the NSP is paying more than adequate consideration to Nationwide Life, and thus fails to meet the fifth requirement of 29 U.S.C. § 1108(b)(5), there is no content to it beyond the naked assertion. *See* discussion *supra*, at pp. 17-20.[9]

[9] To be sure, Plaintiffs may not have information regarding whether the requirement of 29 U.S.C. § 1108(b)(5) has been satisfied (the fourth of the requirements set forth above): that premiums on the insurance

The statutory immunity provided by 29 U.S.C. § 1108(b)(5) is an affirmative defense. Ordinarily a plaintiff is under no burden to plead that an affirmative defense is inappropriate. *See, e.g.*, *BPP III, LLC v. Royal Bank of Scotland Grp. PLC*, 603 F. App'x 57, 59 (2d Cir. 2015). However, *Iqbal* and *Twombly* make clear that a plaintiff is required to allege conduct that is plausibly actionable under the relevant statute. *See generally Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544. A plaintiff is required to go beyond "a sheer possibility that a defendant has acted unlawfully," especially where "[a] defense appears on the face of the complaint." *Iqbal*, 556 U.S at 678; *O'Donnell v. Fin. Am. Life Ins. Co.*, No. 2:14-CV-1071, 2015 WL 1879905, at *4 (S.D. Ohio Apr. 23, 2015) (Frost, J.). Put another way, where "the complaint contains matters of avoidance that effectively vitiate the pleader's ability to recover on the claim, . . . 'the complaint is said to have a built-in defense and is essentially self-defeating.'" *Riverview Health Inst. LLC v. Medical Mut. Ohio*, 601 F.3d 505, 512 (6th Cir. 2012) (quoting 5B Wright & Miller, *Federal Practice & Procedure* § 1357 (3d ed. 2004)).

Thus, a motion to dismiss pursuant to Rule 12(b)(6) will be granted if the claim shows on its face that relief is barred by an affirmative defense. *Id.*; *Bon-Ing*, 2016 WL 6680813, at *2. Accordingly, where the complaint itself establishes the defense, a plaintiff must plausibly plead its failure. *See Patterson*, 2019 WL 4934834, at *16 ("[E]ven though Plaintiffs are under no affirmative burden to plead that [an exemption] is inapplicable, '[a] complaint must allege conduct that is plausibly actionable under the relevant statute and must go beyond creating a sheer

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contracts Nationwide Life has issued to benefit plans sponsored by Nationwide Mutual do not exceed 5% of the premiums Nationwide Life writes on all of its policies. Exhibit 4 to Declaration of Dustin Koenig is an excerpt from the Statutory Annual Statement of Nationwide Life for the year ending December 31, 2019, which is required to be and was filed with the Ohio Department of Insurance. As a public filing, this form of document is appropriate for consideration in a Rule 12(b)(6) motion. *See Bon-Ing, supra*, at *2-3 (documents that "are also public records of state . . . agencies" may be considered on a motion to dismiss based on immunity to suit). Page 3 of that exhibit (Statement of Operations), at line 1, shows that in 2019 Nationwide Life's total premium and annuity consideration income was $10.167 billion. That number compares to the amount of $106,229,558.47 in net inflows in 2019 on Contract GA-P L941, *see* Koenig Decl. Exs. 3(F) and 3(G).

possibility that a defendant has acted unlawfully.") (internal citation omitted). If the complaint fails to properly plead the inapplicability of the defense, the claim shall be dismissed. *See Cervantes v. Invesco Holding Co. (US), Inc.*, No. 1:18-cv-02551-AT, 2019 WL 5067202 at *14, n.10 (N.D. Ga. Sept. 25, 2019) (dismissing complaint on Rule 12(b)(6) motion because although plaintiff pled that exceptions did not apply, "he [did] so in a conclusory way" and "a complaint must allege a course of conduct actionable under the relevant statute") (internal quotations and citation omitted).

As a consequence, it is routine for courts to dismiss ERISA prohibited transaction claims on a Rule 12(b)(6) motion, including for inadequate pleading of the failure to satisfy an affirmative defense. *See, e.g.*, *Cervantes*, 2019 WL 5067202 at *14 (granting motion to dismiss ERISA prohibited transaction claims in connection with challenge to 401(k) plan on Labor Department prohibited transaction exemption 77-3 grounds ("PTE 77-3"), because of failure to plead otherwise);[10] *Patterson*, 2019 WL 4934834, at *16 (dismissing prohibited transaction claims on PTE 77-3 grounds because of plaintiffs' failure to plead or "suggest[]" that redemption fees or sales fees were paid in contravention of such exemption); *Mehling v. NY Life Ins. Co.*, 163 F. Supp. 2d. 502, 510 (E.D. Pa. 2001) (dismissing prohibited transaction claims because plaintiff did "not allege that the fees paid by the Plans are not in compliance with the requirements of PTE 77-3"); *Patterson*, 2018 WL 748104, at *5 (dismissing prohibited transaction claims because of failure to plead non-compliance with requirements of PTE 77-3).

Here, the Amended Complaint presents on its face the defense of 29 U.S.C. § 1106(b)(5). The gravamen of the Amended Complaint is that NSP participants are getting a bad deal from

[10] Prohibited Transaction Exemption 77-3, 42 Fed. Reg. 18734 (Apr. 8, 1977), is an administrative exemption from ERISA's prohibited transaction rules issued by the DOL. It is different from the statutory exemption set forth in 29 U.S.C. § 1108(b)(5); it is not as broad, and applies to mutual funds not insurance companies.

Contract GA-P L941, and that Nationwide Mutual and Nationwide Life are unfairly profiting from it. But Congress in 29 U.S.C. § 1108(b)(5) desired that insurance companies owned by sponsors of benefit plans engage in the "normal business practice" of selling policies to such plans, *see* ERISA Joint Conf. Comm. Report, *supra* p. 22, and thus it granted carriers blanket immunity from the prohibited transaction rules if certain conditions are met. The Amended Complaint mentions these conditions. The issue of whether such immunity applies is at the heart of the prohibited transaction claims Plaintiffs have pleaded, and *Iqbal* and its progeny compel examination whether Plaintiffs have adequately pleaded there is no statutory immunity for such claims.

And Plaintiffs once again fall short. The term "adequate consideration" is not specifically defined in 29 U.S.C. § 1108(b)(5). Accordingly, courts look to the definition for such term that is set forth in the definitions section of ERISA – 29 U.S.C. § 1002(18). *See Jefferson Pilot*, 14 F. 3d at 568 n.4 (11th Cir. 1994); *Dupree*, 2007 WL 2263892, at *33. In relevant part, § 1002(18)(B) defines adequate consideration as "the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary." No such regulations have been promulgated by the Department of Labor, and accordingly, "the relevant standard for measuring adequate consideration under ERISA § 408(b)(5) is whether the consideration [for the insurance contract] is reasonable *as compared to charges paid by arm's-length parties*, *i.e.*, the 'fair market value."' *Dupree*, 2007 WL 2263892 at *33 (emphasis added).

As discussed above, Plaintiffs fail to argue that the compensation amounts paid to Nationwide Life under Contract GA-P L941 were above those that would be paid to other insurance companies selling guaranteed investment contracts. The Amended Complaint provides no benchmark or any market-based information to support a contention that the compensation

Nationwide Life received under Contract GA-P L941 was more than what the NSP would pay if it negotiated a guaranteed investment contract with a different, independent insurer at arm's length. And the Amended Complaint fails to allege that the compensation received by Nationwide Life was so high that the crediting rates Nationwide Life has declared under Contract GA-P L941 are below those if the contract had been negotiated at arm's length with an unaffiliated insurance company. Thus, Plaintiffs fail to adequately plead that the NSP is paying no more than adequate consideration for Contract GA-P L941. Plaintiffs have failed to plausibly show that 29 U.S.C. § 1108(b)(5) is inapplicable to their prohibited transaction claims. Accordingly, for this additional reason, Counts II and III should be dismissed.

CONCLUSION

Ironically, Plaintiffs concede that the Guaranteed Investment Fund is the most popular option in the NSP. Indeed, it is popular precisely because under Contract GA-P L941 Nationwide Mutual's employees have been rewarded with strong returns, and the contract offers a guarantee by a highly rated insurance company of both principal and all credited interest. NSP participants have been advantaged by Contract GA-P L941. It is unfortunate that Defendants were unsuccessful in convincing Plaintiffs, pre-discovery, that they had no viable claims relating to Contract GA-P L941. Although Plaintiffs have failed to choose to voluntarily dismiss their case, the Defendants should not have to litigate it beyond the responsive pleading stage. Plaintiffs' Amended Complaint should be dismissed in full.

Respectfully submitted,

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