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

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. 2:20-CV-01569

Judge James L. Graham

Magistrate Judge Chelsey M. Vascura

# PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT PUSUANT TO RULE 12(b)(6)

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**INTRODUCTION**

ERISA fiduciaries are held to the "highest" duties known to law, which include strict prohibitions against self-dealing. *Chao v. Hall Holding Co.*, 285 F.3d 415, 426 (6th Cir. 2002); *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 750 (6th Cir. 2014). Nationwide disregarded its fiduciary duties under ERISA and used its employees' retirement savings in the Nationwide Savings Plan (the "Plan") for its own purposes, causing over a billion dollars in Plan assets to be transferred into its general account through the Plan's "Guaranteed Fund," financing its business operations and earning enormous amounts of compensation in the process. Defendants continued this course of conduct [redacted] Plaintiffs, both former employees of Nationwide, bring this action to remedy Defendants' misappropriation of their and other participants' retirement savings in violation of ERISA, 29 U.S.C. § 1001 *et seq*.

Rather than address their failures and acts of misappropriation, Defendants disclaim fiduciary responsibility to their employees' retirement savings, claiming a "Transition Policy safe harbor" permits them to deal with the Plan and its assets without regard to ERISA's stringent requirements. This "safe harbor" is not wide enough to offer Defendants shelter and does not apply to the conduct at issue. At base, through their Motion, Defendants attempt to obfuscate the allegations of Plaintiffs' First Amended Complaint ("FAC") rather than offer valid reasons for dismissal. Notably, Defendants ignore the myriad bases of their fiduciary obligations stemming from the unique relationship Nationwide and its agents hold with their employees' retirement savings. Similarly, Defendants ignore the legal standards applicable to a Rule 12(b)(6) motion with respect to Defendants' breaches of fiduciary duties and prohibited transfers, ask the Court to

overlook well settled authority, and impermissibly shift Defendants' own burdens into Plaintiffs' *prima facie* case.

As summarized immediately below and detailed throughout this brief, Plaintiffs' well-plead allegations remain largely uncontested. Congress and the Department of Labor were not so naïve as to permit fiduciaries to play a shell game with employees' retirement savings to circumvent fiduciary obligations and fundamental protections for retirement savings. This attempt to prevent Plaintiffs from obtaining a ruling on the merits should be rejected.

**SUMMARY OF ARGUMENT**

1. Defendants side-step most of Plaintiffs' allegations, conceding Plaintiffs' FAC is well-plead. *First*, Defendants do not dispute the source of their fiduciary status as alleged in the FAC, including being named as such in governing plan instruments, exercising discretionary authority and control over the Plan's management and its assets, and possessing discretionary authority and responsibility in the administration of the Plan. *Second,* Defendants fail to address the procedural and substantive strictures ERISA imposes upon conflicted fiduciaries and Plaintiffs' direct evidence that Defendants failed to clear ERISA's high bar by, *inter alia*,

2. Defendants rely on a "Transition Policy" regulation to exculpate them from all responsibility or liability with respect to the Plan's investment in the Guaranteed Fund. Defendants drastically overstate the relevance of this regulation. As the U.S. Department of Labor ("DOL") explained at length when passing it, the regulation does not offer relief to fiduciaries, like Defendants here, that obtain their fiduciary status through administration and control over the Plan. To make it clear, the DOL stated that its regulation was promulgated to shield from liability insurers that would be found to be fiduciaries *only* because of the insurer's control over their

general account assets, not fiduciaries like the Defendants in this action that indisputably are fiduciaries due to being designated as such by the Plan Document (which governs the Plan) and through their control over the administration and management of the Plan. 65 Fed. Reg. 614-01, 626 (January 5, 2000) ("a Transition Policy would give rise to fiduciary status on the part of the insurer if the insurer had discretionary authority over the administration or management of the plan. *See* section 3(21) of the Act. Thus, nothing in ERISA or this regulation would preclude a finding that an insurer is liable under ERISA for breaches of its fiduciary responsibility in connection with plan management or administration"). Therefore, "[i]f the insurer breaches its fiduciary responsibility with respect to plan assets," and Defendants here do not dispute that the regulation expressly states that the Transition Policy itself is a plan asset, "it would be liable under ERISA regardless of whether the insurer has issued a Transition Policy to a plan or ultimately placed the plan's assets in its general account." *Id. See infra* pp. 12-14.

3. Putting aside that the Transition Policy regulation does nothing to support dismissal, Defendants have not established a Transition Policy even exists and cannot do so on a Rule 12(b)(6) motion. They gloss over the regulation's myriad, fact bound requirements, its incorporation of an affirmative defense for which Defendants carry the burden of proof, and the lack of the factual record Defendants need to satisfy the regulation. Defendants improperly rely on extrinsic evidence to argue that the Transition Policy's requirements are met, and in any event, these documents and Defendants' arguments fail to show that the Guaranteed Fund is a Transition Policy. Defendants cannot establish elements of their affirmative defense under 29 U.S.C. § 1108(b)(5), including its adequate consideration requirement, and also fail to establish the safe harbor's requirement that Nationwide disclose the method used to determine fees, charges, expenses and other amounts that are charged to the Plan. *See infra* pp. 14-17.

4. Similarly, in an attempt to circumvent the Plan Document's requirement that Nationwide is responsible for all contract charges "related to" the Guaranteed Fund, Defendants claim they are only required to pay them if those charges were paid directly from "plan assets." In so doing, Defendants blithely ignore the plain language of the Plan Document that does not so limit its responsibility to whether the charges are assessed directly against plan assets. And, in any event, Defendants' argument regarding the existence of "plan assets" fails for the reasons discussed above. *See infra* pp. 17-19.

5. Defendants also rely on their infirm Transition Policy affirmative defense to seek dismissal of Plaintiffs' ERISA anti-inurement count under 29 U.S.C. § 1103(c). Defendants do not dispute that through offering the Guaranteed Fund in the Plan, [REDACTED] ERISA's "anti-inurement" provision strictly bars Defendants' transfer of their employees' retirement saving into Nationwide's general account. 29 U.S.C. § 1103(c) provides that "the assets of a plan shall never inure to the benefit of any employer." *Id.; see also Winpisinger v. Aurora Corp. of Illinois, Precision Castings Div.*, 456 F. Supp. 559, 565 (N.D. Ohio 1978). Defendants argue that Plan assets could not inure to their benefit because, under Transition Policy's "safe harbor," the Plan assets in the Guaranteed Fund are no longer considered "Plan assets" after being transferred to Nationwide's general account. Because the Transition Policy does not render the Plan's assets used to invest in the Guaranteed Fund free from ERISA's protections, Defendants provide no basis on which to dismiss Plaintiffs' well-plead anti-inurement count. *See infra* pp. 19-21.

6. Like most of Defendants' arguments, Defendants' efforts to dispute claims that they breached their ERISA fiduciary duties of prudence and loyalty rely on avoidance of what Plaintiffs actually pled and depend on faulty legal standards. Ignoring the FAC's allegations that Defendants

failed to engage in a prudent and loyal fiduciary *process*, Defendants attempt to reduce Plaintiffs' claims to one of "excessive compensation." Mot. Dismiss Pls' Am. Compl. Mem. ("Defs. Mem.") at 16-21, ECF No. 41-1, PageID 214-219. However, to determine whether a fiduciary met its duty, "the court focuses not only on the merits of the transaction, *but also on the thoroughness of the investigation into the merits of the transaction.*" *Chao v. Hall Holding Co.*, 285 F.3d 415, 426 (6th Cir. 2002) (emphasis added). This is especially true here where Defendants' loyalties are alleged to be conflicted between their own economic interests and their fiduciary obligations to discharge those duties with an "eye single" to the Plan's participants. *Donovan v. Bierwirth*, 680 F.2d 263, 272-76 (2d Cir.1982), *cert. denied,* 459 U.S. 1069 (1982) (fiduciaries failed to take steps to mitigate the clear potential conflict they had between doing what was best for participants versus doing what was best for themselves, including failing to take "precaution[s] to see that they had carefully considered the other side"); *Leigh v. Engle*, 727 F.2d 113, 125 (7th Cir. 1984) (explaining conflicted fiduciaries must act with an "'eye single' to the interests of the beneficiaries, and the fiduciaries may need to step aside."); *Karpik v. Huntington Bancshares Inc.*, No. 2:17-CV-1153, 2019 WL 7482134, at *4 (S.D. Ohio Sept. 26, 2019) ("There is no balancing of interests; ERISA commands undivided loyalty to the plan participants" (citation omitted)). Defendants ignore or disregard Plaintiffs' evidence of glaring failures to thoroughly investigate the merits of their self-dealing transactions and evidence that undermines the merits of such dealings. This includes evidence in the FAC that Defendants [REDACTED]

[REDACTED] *See infra* pp. 21-26.

7. Plan participants are additionally protected by Section 406 of ERISA (29 U.S.C. §1106), which supplements a fiduciary's duty of loyalty by "categorically" barring transactions

"likely to injure the pension plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) (citation omitted). These "per se" prohibited transactions are aimed at rooting out conflicts of interest and preventing self-dealing. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43, 143 n.10 (1985). Defendants mount a number of fallacious arguments to challenge Plaintiffs' well-plead prohibited transaction claims. *First*, Defendants attempt to shoe-horn one of their affirmative defenses into Plaintiffs' *prima facie* case of prohibited transactions and assert that the FAC must disprove the elements of the "statutory exemption" to ERISA's prohibited transaction provisions asserted in their motion. But Defendants ignore Sixth Circuit precedent holding that statutory exemptions *do not apply* to the prohibited transactions Plaintiffs allege pursuant to 29 U.S.C. § 1106(b). *Hi-Lex*, 751 F.3d at 750. And for the prohibited transactions alleged pursuant to 29 U.S.C. § 1106(a), to which a statutory exemption may apply, Defendants, not Plaintiffs, bear the burden of proving that the exemption is met. They cannot carry this burden. *See infra* pp. 26-35.

*Second*, Defendants again hide behind their Transition Policy argument to assert they could not engage in prohibited transactions if their compensation was not drawn directly from "plan assets." This fails for many of the reasons previously discussed. In addition, in the context of ERISA's prohibited transaction provisions, courts construe the term "plan assets" broadly to protect plan participants, and accordingly, in determining what qualifies as a plan asset, courts have adopted a "functional approach" in which they consider whether the asset "may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries." *Shirk v. Fifth Third Bancorp*, No. 05-CV-049, 2008 WL 4449024, at *16-17 (S.D. Ohio Sept. 26, 2008). *See infra* pp. 27-31.

For these reasons, this Court should deny Defendants' Motion to Dismiss.

## FACTUAL BACKGROUND

Plaintiffs Ryan Sweeney and Bryan Marshall are both former employees of Nationwide Mutual Insurance Company, Nationwide Life Insurance Company, or an affiliate thereof (collectively, "Nationwide") and participants in the Nationwide Savings Plan (the "Plan"), a 401(k) Plan relied upon by Nationwide's current and former employees, and their beneficiaries, to achieve retirement security. FAC ¶¶ 10-11, ECF No. 26, PageID 95, Plaintiffs bring this action on behalf of themselves and a putative class of other Plan participants whose retirement savings were invested through the Guaranteed Investment Fund ("Guaranteed Fund"). FAC ¶ 74, ECF No. 26, PageID 106.

The Plan is a defined contribution pension plan into which Nationwide employees could defer portions of their incomes to save for retirement. FAC ¶¶ 35-38, ECF No. 26, PageID 99-100. The Plan was established and is maintained pursuant to a written instrument referred to as the "Plan Document," through which Nationwide designated the Benefits Investment Committee and its members[1] as fiduciaries to the Plan with broad powers over the Plan, its administration and management, and sets forth rules those fiduciaries must follow in this role. FAC ¶¶ 19-20, 23-29, 43-49, ECF No. 26, PageID 96-98, 100-101. The individual members of the Benefits Investment Committee were each high-level executives of Nationwide that were appointed to their fiduciary roles by Nationwide, acting through its Board of Directors. FAC ¶¶ 19-25, ECF No. 26, PageID 96-98.

The Investment Committee Defendants' conduct was subject to Nationwide's supervision, which was responsible for monitoring their performance and performing annual reviews of the Investment Committee Defendants' fiduciary conduct. FAC ¶¶ 20-22, ECF No. 26, PageID 97. In

[1] Collectively, the "Investment Committee Defendants."

an exercise of their powers, the Investment Committee Defendants selected and maintained the Guaranteed Fund as an investment option in the Plan. FAC ¶ 48, ECF No. 26, PageID 101. Underlying the Guaranteed Fund is a benefit-responsive group annuity contract ("GA-P L941") between Nationwide Life Insurance Company ("NLIC") and the Plan through which participants' contributions are transferred to NLIC's general account. FAC ¶ 52, ECF No. 26, PageID 102. Due to this transfer of assets into NLIC's general account, the fund's name is a misnomer; participant's retirement savings are not truly "guaranteed" but are instead subject to Nationwide's ability to repay the money that was transferred from the Plan. FAC ¶¶ 55-57, ECF No. 26, PageID 102. As a result, if Nationwide is faced with financial difficulty, caused for example, by increased insurance claims due to things like natural disasters or a pandemic, then employees may lose both their jobs and their retirement savings. *See* FAC ¶¶ 55-57, ECF No. 26, PageID 102.

GA-P L941 does not specify the terms on which Nationwide must deal with the Plan, including what, if any, investment return Nationwide will credit the Plan or the amount of compensation Nationwide shall earn from the Plan's investment. FAC ¶¶ 59, 65, ECF No. 26, PageID 103, 104. Instead, "Nationwide determines how much compensation it will earn through the Savings Plan's investment" and "sets the 'crediting rate' for the Guaranteed Fund." FAC ¶¶ 58, 65, ECF No. 26, PageID 102-103, 104. [redacted]. FAC ¶ 64, ECF No. 26, PageID 98. In effect, "Nationwide controlled all aspects of the Savings Plan's investment in the Guaranteed Fund and the compensation it earned. It controlled the compensation and actions of the Investment Committee Defendants; it controlled the actions of the Savings Plan's service provider, NLIC; and it controlled the amount of compensation it would earn from the Guaranteed Fund." FAC ¶ 70, ECF No. 26, PageID 105.

Nationwide compensated itself by assessing contract charges against the Plan's investment through the Guaranteed Fund. FAC ¶ 63, ECF No. 26, PageID 103. However, the Plan Document required Nationwide itself bear any such contract charges. FAC ¶¶ 43-47, ECF No. 26, PageID 100-101. Despite this, during the Class Period, Nationwide set and earned [REDACTED] FAC ¶ 67, ECF No. 26, PageID 104. [REDACTED] FAC ¶ 66, ECF No. 26, PageID 104. The rate of compensation Nationwide determined it would charge the Guaranteed Fund, and thereby reduce the rate of return to the Plan, was grounded in the assumption that Nationwide [REDACTED]. *Id.* ¶ 66. As alleged, the terms Nationwide set for the Plan were materially worse than arm's-length third-parties received and are untethered from any service provided to the Plan. As a result, Defendants dealt with their commercial customers on better terms that it did with its own 401(k) Plan. FAC ¶¶ 66, 69, ECF No. 26, PageID 104, 105.

During the Class Period, [REDACTED] FAC ¶¶ 71-72, ECF No. 26, PageID 105-106. [REDACTED]. FAC ¶ 71, ECF No. 26, PageID 105. [REDACTED]

[redacted]

[redacted] FAC ¶ 72, ECF No. 26, PageID 106.

Plaintiffs seek to recover the Plan's losses and to obtain other appropriate relief to remedy Defendants' breaches of fiduciary duties and prohibited transactions, and intend to do so through a class action representing all Plan participants and beneficiaries. FAC ¶¶ 74, 84-140, ECF No. 26, PageID 106,109-118; 29 U.S.C. §§1109(a), 1132(a)(2), 1132(a)(3), 1106(a)(1)(C), 1106(a)(1)(D), 1106(b)(1), 1106(b)(3), 1103(c).

## LEGAL STANDARD

To state a valid claim, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint does not need "detailed factual allegations" to survive a Rule 12(b)(6) motion, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), but rather must contain sufficient factual matter to state a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595, 598 (8th Cir. 2009) (explaining "plausibility" does not require a plaintiff to negate every possible explanation for a fiduciary decision); *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 326 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2565, 206 L. Ed. 2d 496 (2020) (same). A reviewing court must accept all factual allegations in the complaint as true and must construe the pleadings in the light most favorable to plaintiff. *Majestic Bldg. Maint., Inc. v. Huntington Bancshares Inc.*, 864 F.3d 455, 458 (6th Cir. 2017).

"A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotations omitted). A reasonable inference supporting liability "need not be 'as compelling as any opposing inference' one might draw.'" *N.J. Carpenters Health Fund v. RBS*

*Group, PLC,* 709 F.3d 109, 121 (2d Cir. 2013). Importantly, post-*Twombly*, notice pleading is still the standard. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007).

In the context of an ERISA case, Plaintiffs are not "required to describe directly the ways in which [defendants] breached their fiduciary duties," or "the process by which the Plan was managed." *Braden,* 588 F.3d at 595-96. Nor are plaintiffs required "to plead facts tending to contradict . . . inferences" that could be drawn in defendants' favor. *Id.* As the court explained in Braden:

> …**ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences**. Thus, while a plaintiff must offer sufficient factual allegations to show that he or she is not merely engaged in a fishing expedition or strike suit, we must also take account of their limited access to crucial information. **If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer.** These considerations counsel careful and holistic evaluation of an ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief.

*Id.* at 598 (emphasis added).

## ARGUMENT

### I. Plaintiffs Adequately Plead Claims Of Fiduciary Breach And Violations Of ERISA's Anti-Inurement And Prohibited Transaction Provisions. Defendants' Transition Policy Argument Does Not Render Their Conduct Immune From Liability.

Defendants spill much ink arguing they are immune from all ERISA liability because the Guaranteed Fund is a "Transition Policy" within the meaning of 29 C.F.R. § 2550.401c-1. *E.g.* Defs.' Mem. at 11-16, ECF No. 41-1, PageID 209-214. At base, Defendants argue they could not self-deal with the Plan's assets unless Nationwide's general account assets are deemed "plan assets" within the meaning of 29 U.S.C. § 1002(42). Defs.' Mem. at 15-16, ECF No. 41-1, PageID 213-214. Defendants' myopic view is fundamentally wrong, unsupported by law, and

conspicuously ignores the allegations the FAC actually pleads. Notably, Defendants do not dispute that they are fiduciaries because of their management of the Plan itself, including the transfer of Plan assets to Nationwide. FAC ¶¶ 22, 28-29, 51, 58-67, ECF No. 26, PageID 97, 98, 101, 102-104. Nor do they dispute that they engaged in self-dealing by transferring billions of dollars of the Plan's assets to themselves to fund their business operations and earn compensation, FAC ¶¶ 51, 67, 72, ECF No. 26, PageID 101, 104, 106. As detailed below, Defendants' argument that its general account are not "plan assets" is a strawman constructed to draw attention away from Plaintiffs' well-plead allegations.

**A. Defendants' Fiduciary Status and Attendant Obligations do not Turn on Whether Nationwide's General Account Assets are Plan Assets.**

(1) <u>The Transition Policy is not a Valid Safe Harbor for the Conduct Alleged in Plaintiffs' Amended Complaint.</u>

The Transition Policy "safe harbor" on which Defendants so heavily rely came into existence after the Supreme Court corrected insurance companies' long-standing belief that insurers generally owed no ERISA fiduciary duty to the ERISA plans with whom the insurers only had commercial relationships. Namely, in *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, the Supreme Court held that there are instances where an insurance company's general account assets are "plan assets." 510 U.S. 86, 110 (1993). Because one basis for becoming a functional fiduciary is exercising control over "plan assets," *see* 29 U.S.C. 1002(23)(A)(i), *John Hancock* exposed insurers to sweeping obligations and liability that affected their dealings with swaths of investors who purchased insurance products. *See id.*, 510 U.S. at 110. In response, Congress ordered the DOL to create a *limited* safe harbor that would clarify when an insurer's general account assets are broadly deemed plan assets. 29 U.S.C. § 1101(c); *John Hancock*, 510 U.S. at 110 (explaining an act of Congress was needed to protect insurance companies from

"considerable exposure to the ensuing litigation that would be brought by pension plans and others alleging fiduciary breaches").

The DOL promulgated such regulation at 29 C.F.R. § 2550.401c-1. Importantly, when promulgating this regulation, the DOL explained that its safe-harbor was both limited and did not extend to the precise conduct at issue in this case, which indisputably involves fiduciaries that have authority over the administration and management of the Plan and are designated as named fiduciaries in the Plan Document. *See* 65 Fed. Reg. 614-01 at 626; FAC ¶¶ 22, 28-29, 51, 58-67, ECF No. 26, PageID 97-98, 101-104. The regulation was promulgated to shield from liability insurers that would be fiduciaries *only* because of the insurer's control over their general account assets, not fiduciaries like the Defendants in this action. As the DOL explained:

> "a Transition Policy would give rise to fiduciary status on the part of the insurer if the insurer had discretionary authority over the administration or management of the plan. *See* section 3(21) of the Act. Thus, *nothing in ERISA or this regulation would preclude a finding that an insurer is liable under ERISA for breaches of its fiduciary responsibility in connection with plan management or administration*. Similarly, neither ERISA nor the regulation precludes a finding that an insurer is a fiduciary by reason of its discretionary authority or control over plan assets. If the insurer breaches its fiduciary responsibility with respect to plan assets, it would be liable under ERISA regardless of whether the insurer has issued a Transition Policy to a plan or ultimately placed the plan's assets in its general account."

65 Fed. Reg. 614-01 at 626 (emphasis added).

Importantly, Defendants do not dispute their status as fiduciaries on the bases Plaintiffs allege (by virtue of being named as fiduciaries in the governing Plan Document, possessing and exercising control over the Plan and its assets, and possessing discretionary authority over the administration of the Plan). FAC ¶¶ 22, 28-29, 51, 58-67, ECF No. 26, PageID 97, 98, 101, 102-104. As the DOL explained, the Transition Policy provides no safe-harbor for fiduciaries like the Defendants in this case. Just like the example provided by the DOL, Defendants here are not fiduciaries merely because they exercised control over general account assets. *Id.* Defendants here

are fiduciaries because they, *inter alia*, "had discretionary authority over the administration or management of the plan" and therefore are liable for using their control over the Plan and its assets to capture billions of dollars in operating capital and [REDACTED]. *See* 65 Fed. Reg. 614-01 at 626; *see* 29 U.S.C. § 1002(23)(A); *see also* FAC ¶¶ 22, 28-29, 51, 58-67, ECF No. 26, PageID 97, 98, 101, 102-104.

(2) <u>The Assets of the Plan and the Guaranteed Fund are "Plan Assets" Over Which Defendants Exercised Control.</u>

Finally, although Defendants are fiduciaries with respect to the Plan's Guaranteed Fund investment on numerous independent bases, *supra* Part I.A.1, they also did in fact exercise control over plan assets with respect to the Guaranteed Fund and Defendants' sole argument to the contrary fails as well.

*First,* the assets of the Nationwide Savings Plan are "plan assets" because they consist of both employee and employer contributions into a qualified retirement plan. *Hi-Lex*, 751 F.3d at 745 (both employee and employer contributions are deemed "plan assets"); 29 C.F.R. § 2510.3-102(a) (employee contributions are "plan assets."); *Sec'y of Dep't of Labor v. United Transp. Union*, No. 1:17 CV 923, 2019 WL 1382290, at *6 (N.D. Ohio Mar. 27, 2019) (same). Defendants are fiduciaries to the Plan because they control these plan assets. In an exercise of their control, they caused over $1 billion of plan assets to be transferred to themselves, exposing the Plan to enormous, undiversified risk, and, in turn, transferred substantial amounts of compensation for themselves from those plan assets. FAC ¶¶ 51, 67, 72, 138, ECF No. 26, PageID 101, 104, 106, 118. From the plan assets they transferred to their own general account, Defendants earn enormous amounts of compensation at rates they set themselves: this is *per se* prohibited. *Hi-Lex,* 751 F.3d at 750 ; *Ellis v. Comm'r*, 787 F.3d 1213, 1216 (8th Cir. 2015) (explaining how indirect transfers of plan assets are prohibited by identical and parallel IRS laws); *Falberg v. Goldman Sachs Grp.,*

*Inc.*, No. 19 CIV. 9910 (ER), 2020 WL 3893285, at *13-*14 (S.D.N.Y. July 9, 2020) (explaining retaining an investment to receive transfers of fees indirectly from the plan is *per se* prohibited); *see also Acosta v. Schwab*, No. 5:18-CV-3544, 2019 WL 7046916, at *8 (E.D. Pa. Dec. 20, 2019) (holding fiduciary violated § 1106(b) "by commingling Plan assets with Company funds"). *See also infra* Part V.A (showing why, under ERISA's prohibited transaction provisions, Defendants' compensation is derived from plan assets).

*Second*, as the "safe-harbor" regulation expressly states, the Transition Policy itself is a "plan asset." 29 C.F.R. § 2550.401c-1(a)(2) ("when a plan has acquired a Transition Policy … the plan's assets include the Transition Policy"). Defendants do not dispute that they exercised control over this plan asset. In particular, the Guaranteed Fund gives Nationwide unbridled authority to set and receive its compensation pursuant to the Guaranteed Fund and Nationwide exercises this discretion, both in determining how to invest the Plan's assets and how much to compensate itself from the Guaranteed Fund. 29 U.S.C. § 1102(23) ("a person is a fiduciary with respect to a plan to the extent (i) he … exercises any authority or control respecting management or disposition of its assets"); *Seaway Food Town, Inc. v. Med. Mut. of Ohio*, 347 F.3d 610, 619 (6th Cir. 2003) (explaining, if a contract gives a party discretion to set its own compensation, it is a fiduciary for that purpose).[2] Defendants are, therefore, fiduciaries due to their control over Plan assets, in addition to being fiduciaries because of other duties they owe with respect to the Plan's Guaranteed Fund investment. Accordingly, the Transition Policy on which Defendants rely cannot shield them from liability for this second reason, as explained by the DOL in its regulation: as fiduciaries "by reason of its discretionary authority or control over plan assets," Defendants are "liable under

[2] Of course, this case is unique from the dealings in *Seaway Food Town, Inc. v. Medical Mutual of Ohio*, 347 F.3d 610, 619 (6th Cir. 2003) because there was *never* an arm's-length dealing here.

ERISA [for their breaches] regardless of whether the insurer has issued a Transition Policy to a plan or ultimately placed the plan's assets in its general account." *See* 65 Fed. Reg. 614-01 at 626.

**B. Defendants' Do Not Establish That the Plan Holds a Transition Policy.**

Despite the futility of Defendants' Transition Policy argument, it must be rejected for the independent reason that it relies on extrinsic evidence and their Motion does not otherwise establish that the elements of the safe harbor are met. "[I]t is elementary that the Court does not (and cannot) consider matters outside the four corners of the complaint when considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Allen v. Andersen Windows, Inc.*, 913 F. Supp. 2d 490, 499 (S.D. Ohio 2012); *Clark v. Walt Disney Co.*, 642 F. Supp. 2d 775, 781 (S.D. Ohio 2009); *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 487 (6th Cir. 2009) ("Rule 12(b)(6), besides some minor exceptions, does not permit courts to consider evidence extrinsic to the pleadings").

Defendants rely entirely on extrinsic evidence attached in Declarations supporting their Motion to argue that contract GA-P L941 satisfies the regulation's requirements to be deemed a Transition Policy. Defs.' Mem. at 13-15, ECF No. 41-1, PageID 211-213.[3] In submitting such evidence, Defendants do not rely on any "exception" to the Rule that extrinsic evidence cannot be considered when deciding a 12(b)(6) motion, and instead suggest their multitude of exhibits "fills in the contours" of the FAC. *E.g.* Defs.' Mem. at 7 n.4, ECF No. 41-1, PageID 205. This is not a valid basis for considering such information on a motion to dismiss.[4]

[3] Defendants' "Transition Policy" Defense was raised for the first time in this Motion. *Contra* Defs' Mem. at 2, ECF No. 41-1, PageID 200. The defense they raised in their efforts to get Plaintiffs to voluntarily dismiss is conspicuously absent from their Motion. *Contra* Defs' Mem. at 2, ECF No. 41-1, PageID 200. Although the evidence Defendants produced does not carry their burden, there should be no confusion that Defendants never produced or made Plaintiffs aware of the evidence they improperly introduce here.

[4] Defendants' inclusion of Mr. Towarnicky's declaration, exhibits attached thereto, and other exhibits are subject to Plaintiffs' separate Motion to Exclude, filed contemporaneously herewith.

In any event, Defendants' reliance on the "safe-harbor" presupposes that all elements of the Transition Policy regulation are met. They are not. For instance, to be properly deemed a Transition Policy, Defendants must demonstrate they satisfy all elements of 29 U.S.C. § 1108(b)(5) – an affirmative defense. *See* 29 C.F.R. § 2550.401c-1(b)(2)(ii). As discussed, *infra* at Section VI(B), Defendants fail to carry this burden at this stage. Similarly, the safe-harbor requires disclosure of the method Nationwide will use to "determine the fees, charges, expenses or other amounts that are, or may be, assessed against the policyholder," 29 C.F.R. § 2550.401c-1(c)(3)(i)(A), and "[a]n itemized statement of all fees, charges, expenses or other amounts assessed against the policy … and a description of the method used by the insurer to determine the precise amount of the fees, charges and other expenses." *Id.* at (c)(4)(vi). Defendants do not provide evidence necessary to establish these elements, nor can they: as alleged, "The group annuity contract between NLIC and the Savings Plan does not specify the amount of compensation that Nationwide, through NLIC, will earn. Nor does the group annuity contract specify any formula according to which Nationwide's compensation is calculated. *Instead, Nationwide determines how much compensation it will earn through the Savings Plan's investment*." FAC ¶ 65, ECF No. 26, PageID 104 (emphasis added).

## II. **Defendants' Plan Document Argument Ignores That The Guaranteed Fund's Contract Charges Are Paid With Plan Assets, And In Any Event, Is Counter-Textual To Plan Language Requiring That Nationwide Pay These Charges.**

Defendants do not dispute that under ERISA, they are required to manage and administer the Plan "in accordance with the documents and instruments governing the plan" as long as the document is consistent with ERISA. 29 U.S.C. § 1104(a)(1)(D); *Best v. Cyrus*, 310 F.3d 932, 935 (6th Cir. 2002); *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1207 (S.D. Tex. 1991), *aff'd sub*

For the reasons stated in that Motion, the Court should refuse to consider this declaration and these documents when ruling on Defendants' Motion to Dismiss.

*nom. Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994) ("Gulf need not have drafted the Plan to require it to pay these expenses, but having done so, it had to comply with that obligation"); *cf.* DOL FAB No. 2003-03 ("Where the method of allocating expenses is determined by the plan sponsor (i.e., set forth in the plan documents), fiduciaries, consistent with [§ 1104(a)(1)(D)], will be required to follow the prescribed method of allocation").

Here, the Plan Document expressly requires that Nationwide (the Plan Sponsor) pay all contract charges "related to" the Guaranteed Fund. FAC ¶¶ 46-47, ECF No. 26, PageID 101. Contrary to this language, [REDACTED] FAC ¶¶ 66-67, ECF No. 26, PageID 104. Not only did Nationwide not pay the Guaranteed Fund contract charges, they received them as compensation, unlawfully enriching itself while dramatically reducing the retirement savings of their employees. FAC ¶¶ 64-68, ECF No. 26, PageID 104. As alleged, this is a breach under 29 U.S.C. § 1104(a)(1)(D) because Nationwide was obliged but failed to bear the [REDACTED] charges itself, and instead imposed them on its employees' retirement savings.

In their Motion, Defendants continue their campaign of misdirection and claim, without textual support, that Nationwide was only responsible for bearing these charges if they are drawn directly from "plan assets." This argument both ignores that the Guaranteed Fund charges are indeed paid by the Plan with Plan assets and, in any event, is counter-textual to the language of the Plan Document. The Plan Document unambiguously states that "expenses not eligible to be paid by Plan assets shall be paid by the Plan Sponsor" and it clarifies that expenses not eligible to be paid by Plan assets include "contract charges under the insurance contract related to the guaranteed investment fund [the Guaranteed Fund at issue in this case]." FAC ¶¶ 46-47, ECF No. 26, PageID 101. As explained, these charges are paid by the Plan's assets: Defendants transferred over $1

billion of the Plan's assets to itself, then exercised control over the Guaranteed Fund (another "plan asset") to set and receive its compensation from the Plan's assets. *Supra* Part I.A(2).

But even so, Defendants read into the Plan Document language that does not exist. The Plan Document does not require Nationwide to pay these expenses *only if* they are paid from "plan assets;" it instead unambiguously provides that Nationwide must pay expenses related to the Guaranteed Fund because the Plan Document designates these expenses as Nationwide's obligation – whether or not the expenses are drawn directly from Plan assets. FAC ¶¶ 46-47, ECF No. 26, PageID 101 (all expenses not eligible to be paid from Plan assets, defined as including Guaranteed Fund contract charges, must be paid by the Plan Sponsor – Defendant Nationwide). Accordingly, Defendants misconstrue the Plan's clear language that any expense not deemed by the Plan as payable from Plan assets must be paid by Nationwide. Because, as Plaintiffs allege, the Plan Document expressly identifies the charges at issue here – the Guaranteed Fund contract charges – as expenses that cannot be paid from Plan assets, they must be paid by Nationwide. FAC ¶¶ 46-47, 91, ECF No. 26, PageID 101,110-111.

## III. Defendants Violated ERISA's Anti-Inurement Rule By Transferring Plan Assets To The Benefit Of Nationwide And NLIC.

ERISA's "anti-inurement" provision strictly bars Defendants' transfer of their employees' retirement saving into Nationwide's general account, which is then used to fund Nationwide's operations and earn it substantial compensation. 29 U.S.C. § 1103(c) provides that "the assets of a plan shall never inure to the benefit of any employer." *See also Winpisinger v. Aurora Corp. of Illinois, Precision Castings Div.*, 456 F. Supp. 559, 565 (N.D. Ohio 1978) ("the obvious intent of Congress is that 1104(a)(1)(A) shall mean that 'the assets of a plan shall never inure to the benefit

of any employer,' thus forever forbidding employer self-dealing in the Fund's assets").[5] Through offering the Guaranteed Fund as a Plan investment option, Defendants transferred nearly 30% of their employees' total contributions to the Plan (which include both employee contributions and employer match) back to their employers. FAC ¶¶ 18, 31, 50, 51, 135-37, ECF No. 26, PageID 96, 99, 101, 117-118. Defendants then used these Plan assets to fund Nationwide's operations and earn [redacted] compensation over the past six years alone. FAC ¶¶ 55-57, 67, 138, ECF No. 26, PageID 102, 104, 118. In effect, Defendants misappropriated their employees' retirement savings to their corporate coffers to earn compensation. That ends the inquiry under 29 U.S.C. § 1103(c). *See, e.g., Acosta v. Finishing Professionals, LLC,* No. 18-CV-00978-RPM-NYW, 2018 WL 6603641, at *5 (D. Colo. Nov. 20, 2018) ("Courts interpreting this provision have found that the misappropriation of plan assets to corporate accounts constitutes a violation of the anti-inurement provision"); *Mazza v. Sheet Metal Workers' Nat. Pension Fund*, 410 F. App'x 464, 467 (3d Cir. 2010).

Defendants sole authority regarding inurement is entirely inapposite. Defs.' Mem. at 17, ECF No. 41-1, PageID 215. *Bottle Beer Drivers* concerned a labor union's payments to Anheuser Busch for union expenses. *Bottle Beer Drivers, Warehouseman & Helpers Teamsters Local 843 v. Anheuser Busch Inc.*, 96 F. App'x 831, 834 (3d Cir. 2004) ("Union officers at the time testified at their depositions that they understood themselves to be reimbursing the company for its costs rather than making plan contributions"). Importantly, funds the union paid did not come out of plan assets but instead came directly from the union. The funds were <u>not</u> contributions by employees or employers into a retirement plan or money paid into the plan's trust for the benefit of participants. This is not the case here where Defendants caused employer and employee

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[5] This statutory provision includes certain exceptions, *see* 29 U.S.C. §1103(c)(1) ("except as provided…"), but none apply here, and Defendants do not and cannot argue otherwise.

contributions to the Plan – that is, Plan assets – to inure to their benefit. *See supra* Part I.A.2. Defendants' self-enriching misappropriation of its employees' retirement savings is not permitted by ERISA.[6]

## IV. Plaintiffs Have Plausibly Alleged That Defendants Breached Their Duties Of Prudence And Loyalty.

ERISA imposes duties on fiduciaries that are the "highest" known to law, including the duties to act prudently and "solely in the interest of the participants." 29 U.S.C. § 1104(a)(1); *Chao*, 285 F.3d at 426. These duties work together to ensure that ERISA-plan fiduciaries thoroughly investigate the merits of a particular investment decision, make only meritorious investment decisions, and actively exclude any self-interest when making such decisions. *Chao*, 285 F.3d at 426 ("The court focuses not only on the merits of the transaction, *but also on the thoroughness of the investigation into the merits of the transaction*") (emphasis added); *Braden,* 588 F.3d at 595(explaining the "prudent person standard is an objective standard ... that focuses on the fiduciary's conduct preceding the challenged decision"). The Supreme Court clarified that plan fiduciaries are required to systematically review, on an ongoing basis, all plan investments, including all the fees and costs associated with those investments. *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828-29 (2015); *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197 (9th Cir. 2016).

Where fiduciaries, like Defendants here, are faced with competing loyalties between their economic interests and fiduciary obligations, they must make extraordinary efforts to exclude any and all bias from their decision-making process or step aside. *Donovan v. Bierwirth*, 680 F.2d 263, 272-76 (2d Cir.1982), *cert. denied,* 459 U.S. 1069 (1982) (fiduciaries failed to take steps to mitigate the clear potential conflict they had between doing what was best for participants versus

[6] There were alternative insurance arrangements that would not require Defendants to transfer the Plan's assets into its general account, including segregating the Plan's assets into a "separate account." *See* 29 C.F.R. § 2550.401c-1(d)(2)(a), (b).

doing what was best for themselves, including failing to take "precaution[s] to see that they had carefully considered the other side"); *Leigh*, 727 F.2d at 125 (7th Cir. 1984) ("where the potential for conflicts is substantial, it may be virtually impossible for fiduciaries to discharge their duties with an 'eye single' to the interests of the beneficiaries, and the fiduciaries may need to step aside"); *Bussian v. RJR Nabisco*, Inc., 223 F.3d 286, 298 (5th Cir. 2000) (explaining conflicted fiduciaries must "tak[e] all steps necessary to prevent conflicting interests from entering into the decision-making process"); *Karpik v. Huntington Bancshares Inc.*, No. 2:17-CV-1153, 2019 WL 7482134, at *4 (S.D. Ohio Sept. 26, 2019) ("There is no balancing of interests; ERISA commands undivided loyalty to the plan participants" (citation omitted)). The overwhelming weight of authority holds that conflicted fiduciaries that use affiliated investments or services without engaging in a scrupulous, independent investigation have breached their fiduciary duties and are liable for losses and profits. *E.g.*, *Chao*, 285 F.3d at 432; *In re Regions Morgan Keegan ERISA Litig.,* 692 F. Supp. 2d 944, 957 (W.D. Tenn. 2010); *Shirk v. Fifth Third Bancorp*, No. 05-CV-049, 2008 WL 4449024, at *9 (S.D. Ohio Sept. 26, 2008); *Karpik*, 2019 WL 7482134, at *7-8.[7]

A plaintiff need not detail the fiduciary's decision-making process before a motion to dismiss, as that tends to "systemically to be in the sole possession of defendants." *Braden*, 588 F.3d at 598. However, Plaintiffs have alleged sufficient facts to show that Plan fiduciaries, each

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[7] *Wildman v. Am. Century Servs., LLC*, 237 F. Supp. 3d 902, 914 (W.D. Mo. 2017); *Feinberg v. T. Rowe Price Grp., Inc.*, No. CV MJG-17-0427, 2018 WL 3970470, at *5-*6 (D. Md. Aug. 20, 2018); *Baird v. BlackRock Institutional Tr. Co., N.A.*, 403 F. Supp. 3d 765, 781 (N.D. Cal. 2019); *Falberg v. Goldman Sachs Grp.*, Inc., No. 19 CIV. 9910 (ER), 2020 WL 3893285, at *10 (S.D.N.Y. July 9, 2020); *In re M&T Bank ERISA Litig.*, 2018 WL 4334807 (W.D.N.Y. Sept. 11, 2018); *Moreno v. Deutsche Bank Americas Holding Corp.*, 2016 WL 5957307 (S.D.N.Y. Oct. 13, 2016); *Leber v. Citigroup 401(K) Plan Inv. Cmte.*, 2010 WL 935442 (S.D.N.Y. Mar. 16, 2010); *accord Bekker v. Neuberger Berman Inv. Comm.*, 2019 WL 2073953 (S.D.N.Y. May 9, 2019) (holding allegations not futile on motion to amend); *Brotherston v. Putnam Investments*, LLC, No. CV 15-13825-WGY, 2016 WL 1397427, at *1 (D. Mass. Apr. 7, 2016); *Howard v. Shay*, 100 F.3d 1484, 1489-90 (9th Cir. 1996).

facing an inherent conflict of interest, FAC ¶¶ 24, 65, ECF No. 26, PageID 97-98, 104, [redacted]

FAC ¶ 72, ECF No. 26, PageID 106. As expressly detailed by Plaintiffs, the amount of compensation Defendants secured through their dealing with Plan assets is substantial, in excess of what third parties on the market pay, and based on assumptions that bear no relationship to the services Defendants provide to the Plan. FAC ¶¶ 66, 67, 69, ECF No. 26, PageID 104-105. Indeed, Nationwide earned [redacted] from the Plan's assets. FAC ¶ 67, ECF No. 26, PageID 104. This rate of compensation was grounded in the assumption that [redacted] FAC ¶ 66, ECF No. 26, PageID 104. Moreover, third parties dealing with Nationwide at arm's-length received better terms than the Plan when investing in the *same general account*, which cost the Plan tens of millions of dollars in retirement savings. FAC ¶ 69, ECF No. 26, PageID 105.

Tellingly, Defendants do not address these glaring procedural failings in their Motion; they simply ignore ERISA's requirement that fiduciaries, particularly conflicted fiduciaries, engage in a scrupulous process to independently and thoroughly investigate the merits of an investment. Defendants' [redacted] are alone sufficient to state a claim for breach of fiduciary duty, because Plaintiffs have plead direct evidence of a flawed process that

served Defendants' interests. *Chao*, 285 F.3d at 430 (explaining there is no "thorough investigation" if a consultant is not given complete and accurate information); *Dorman v. Charles Schwab Corp.*, No. 17-CV-00285-CW, 2019 WL 580785, at *5 (N.D. Cal. Feb. 8, 2019) (denying motion to dismiss because "the lack of any Mercer report or EBAC minutes stating the independent consultant Mercer's recommendation … give[s] rise to an inference of imprudence and disloyalty in EBAC's process"); *In re Regions Morgan Keegan ERISA Litig.*, 692 F. Supp. 2d at 957 (allegations of breach of fiduciary duty consisting only of circumstantial evidence of flawed process sufficient to withstand motion to dismiss); *Wildman v. Am. Century Servs., LLC,* 237 F. Supp. 3d 902, 914 (W.D. Mo. 2017) (denying motion to dismiss where plaintiffs allege process used to investigate plan investments was deficient).

Nonetheless, Defendants attempt to sidestep Plaintiffs' well-plead allegations of breach by arguing Plaintiffs merely claim that Defendants earned "excessive compensation," and fail to adequate plead this claim. Defs.' Mem. at 17-20, ECF No. 41-1, PageID 215-218. However, Plaintiffs are not alleging a separate claim that the Defendants paid excessive compensation, but only assert that the excessive compensation is circumstantial evidence of fiduciary breach. *See Karpik*, 2019 WL 7482134, at *4 (explaining that the claim of "excessive compensation" merely supported plaintiffs' more general allegations of loyalty and prudence breaches).[8] Such circumstantial evidence of breach is not even necessary here, where there are conflicted fiduciaries and direct evidence of a flawed process. Indeed, allegations of self-dealing, like those here, set apart well-plead claims of fiduciary breaches from those merely alleging excessive compensation to unaffiliated service providers. *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014); *Terraza*

[8] Assuming Defendants were permitted to earn compensation from the Plan's assets at all, ERISA prohibits "unreasonable compensation," whether or not it is "excessive." *See* 29 CFR § 2550.408c-2(b)(5). It is Defendants' burden to show its compensation was both permitted and reasonable. *E.g., Infra* Part V.B; *Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056, 1066 (M.D. Tenn. 2018).

*v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1080 (N.D. Cal. 2017). Defendants' own authority reflects this distinction. *See Laboy v. Bd. of Trustees of Bldg. Serv.* 32 BJ SRSP, No. 11 CIV. 5127 HB, 2012 WL 701397, at *3 (S.D.N.Y. Mar. 6, 2012) ("allegations of self-dealing are what set apart judicial decisions … where the courts allowed the plaintiffs' claims to go forward").[9]

In addition, Defendants' authority is inapposite to situations where Plaintiffs' plead direct evidence of a flawed decision-making process, FAC ¶¶ 71-72, ECF No. 26, PageID 105-106; evidence that third parties negotiated better terms, at arm's-length, to invest in the same investment vehicle as the Plan, FAC ¶ 69, ECF No. 26, PageID 105; or evidence that the challenged compensation lacks a rational relationship to the services provided, FAC ¶ 66, ECF No. 26, PageID 104.[10] In *Bekker v. Neuberger Berman Grp. LLC*, the Court dismissed plaintiff's claims of breach because plaintiff did not explain why their fee comparators were meaningful or provide any direct evidence of a flawed process. *Id.* No. 16 CV 6123, 2018 WL 4636841, at *7 (S.D.N.Y. Sept. 27, 2018). Later, the Court in *Bekker* held plaintiff's amendment was not futile after he explained why his comparisons were apt. *Bekker v. Neuberger Berman Inv. Comm.,* 2019 WL 2073953, at *2 (S.D.N.Y. May 9, 2019). Similarly, the plaintiff in *Patterson* did not provide direct evidence of a flawed process or any evidence that third parties received better terms for the same service.

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[9] *See also Kong v. Trader Joe's Co.*, No. CV2005790PAJEMX, 2020 WL 5814102, at *6 (C.D. Cal. Sept. 24, 2020) (explaining plaintiffs alleged no facts that question the fiduciaries' loyalty); *Scott v. Aon Hewitt Fin., Advisors, LLC*, No. 17 C 679, 2018 WL 1384300, at *7 (N.D. Ill. Mar. 19, 2018*)* (holding defendant was not a fiduciary that could engage in self-dealing); *In re Honda of Am. Mfg., Inc. ERISA Fees Litig.*, 661 F. Supp. 2d 861, 867 (S.D. Ohio 2009) (involving no conflict of interest).

[10] *Supra* p. 23. *See also Vellali v. Yale Univ.*, 308 F. Supp. 3d 673, 684–85 (D. Conn. 2018) (denying motion to dismiss breach of fiduciary claim involving excessive compensation where plaintiff's alleged costs "swelled out of proportion to the actual services provided" and other procedural flaws); *Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056, 1066 (M.D. Tenn. 2018) (same, explaining, "Whether fees are unreasonable is an issue that should be taken up at summary judgment. … The reasonableness of fees is a defense and does not have to be pleaded by the Plaintiffs.") (internal citations omitted).

*Patterson v. Morgan Stanley*, No. 16-CV-6568 (RJS), 2019 WL 4934834, at *12 (S.D.N.Y. Oct. 7, 2019). Finally, and contrary to Defendants' suggestion of dismissal, the court in *Dorman* denied defendants' motion to dismiss plaintiffs' breach of fiduciary duty claims, despite challenges to excessive fee evidence, because conflicted fiduciaries there acted in a self-interested manner without enlisting the advice of their independent consultant. 2019 WL 580785, at *5. *Contra* Defs.' Mem. at 20, ECF No. 41-1, PageID 218.

There is no more adequate a comparator than what Plaintiffs plead here: what arm's-length third parties pay to invest in the same vehicle as the Plan. FAC ¶ 69, ECF No. 26, PageID 105; 26 CFR § 1.162-7(b)(3). Defendants assert that Plaintiffs need to allege a comparable market-based outcome, but paradoxically claim evidence of what was available on the market cannot meet their standard. Defs.' Mem. at 20, ECF No. 41-1, PageID 218. While Defendants' standard for assessing claims of breach of fiduciary duty is wrong as a matter of law, Plaintiffs satisfy it here.

## V. Plaintiffs Have Sufficiently Alleged That Defendants Engaged In Self-Dealing Transactions Prohibited By ERISA, 29 U.S.C. § 1106.

Section 406 of ERISA (29 U.S.C. § 1106) supplements a fiduciary's duty of loyalty by "categorically" barring transactions "likely to injure the pension plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996) (citation omitted). These "per se" prohibitions have been described as a "gloss on the duty of loyalty." *Chesemore v. Alliance Holdings, Inc.,* 886 F. Supp. 2d 1007, 1055 (W.D. Wis. 2012); *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43, & 143 n.10 (1985). As the Supreme Court has said, each prohibition enumerated in §1106 is aimed at rooting out conflicts of interest and preventing self-dealing. *Russell*, 473 U.S. at 142-43 & 143 n.10.

Plaintiffs state viable claims that Defendants engaged in prohibited transactions with a party-in-interest and with a fiduciary in violation of 29 U.S.C. § 1106(a)-(b).[11] Specifically, Plaintiffs allege that the Investment Committee Defendants, among other Defendants, acted to cause the Plan to be invested in the Guaranteed Fund, knowing that this would result in the Plan (1) repeatedly paying fees and other compensation to Nationwide and NLIC, and (2) repeatedly transferring assets to NLIC that were used to compensate Nationwide and support Nationwide's business operations. FAC ¶¶ 99-132, ECF No. 26, PageID 112-117. This self-dealing conduct caused the Plan to engage in transactions that Defendants knew or should have known constituted furnishing of services between the Plan and a party-in-interest, direct or indirect transfers of Plan assets to, or use of Plan assets by or for the benefit of parties in interest, and transactions between the Plan and its fiduciaries in violation of 29 U.S.C. §§ 1106(a)(1)(C), (D), and 1106(b). As a result of these prohibited transactions, the Plan paid millions of dollars in prohibited fees and suffered losses. FAC ¶¶ 115-18, 125-32, ECF No. 26, PageID 114-117.

### A. Defendants' Asserted Statutory Defense under 29 U.S.C. § 1108(b)(5) is Inapplicable to Fiduciary Self-Dealing Allegations under 29 U.S.C. § 1106(b).

In asserting that the Court should dismiss Plaintiffs' prohibited transaction claims, Defendants ignore the distinction between claims under 29 U.S.C. § 1106(a), which relate to transactions between a plan and a party-in-interest, and 29 U.S.C. § 1106(b), which relate to self-dealing by a plan's fiduciaries. Defs.' Mem. at 21, ECF No. 41-1, PageID 219.

[11] The term "party in interest" is defined in 29 U.S.C. § 1002(14). ERISA prohibits self-dealing in the form of acting on behalf of or representing a party whose interests are adverse to that of the trust, its participants, or beneficiaries. The term "adverse party" is defined broadly and does not require that the interests be antithetical, but only that they be different. *See, e.g., Sandoval v. Simmons*, 622 F. Supp. 1174 (C.D. Ill. 1985).

Starting with § 1106(b), to ensure that plans have adequate protection, § 1106(b) precludes self-dealing transactions between a fiduciary and the Plan, including prohibiting a fiduciary from dealing with the assets of the plan in its own interest or receiving any consideration for its own personal account from any party dealing with such plan in connection with a transaction involving plan assets. *See* 29 U.S.C. §§ 1106(b)(1), (b)(3); *Pipefitters Local 636 Ins. Fund v. Blue Cross and Blue Shield of Michigan*, 722 F.3d 861, 868 (6th Cir. 2013). "Section 1106(b) thus creates a per se ERISA violation; and therefore, even in the absence of bad faith, or in the presence of a fair and reasonable transaction, § 1106(b) establishes a blanket prohibition of certain acts, easily applied, in order to facilitate Congress' remedial interest in protecting employee benefit plans." *Shirk v. Fifth Third Bancorp*, No. 05-CV-049, 2008 WL 4449024, at *15 (S.D. Ohio Sept. 26, 2008). *See also Gilliam v. Edwards,* 492 F. Supp. 1255, 1263 (D.N.J. 1980) (finding that the prohibitions under § 1106(b) are absolute).

Accordingly, the § 1108(b)(5) statutory exemption Defendants raise only concerns Plaintiffs' §1106(a) claims, not their §1106(b) claims. *Hi-Lex*, 751 F.3d at 750 ("As interpreted by this court, that statute [§1106(b)] contains an 'absolute bar against self dealing.'") (quoting *Brock v. Hendershott,* 840 F.2d 339, 341 (6th Cir.1988)); *Shirk*, 2008 WL 4449024, at *15; *Daniels v. Nat'l Employee Benefit Servs., Inc.,* 858 F. Supp. 684, 693 (N.D. Ohio 1994) ("Thus, § 1108 does not apply to § 1106(b), because fiduciaries are prohibited from receiving consideration – whether or not reasonable – from a third party for transactions involving the plan to which they owe their fiduciary obligations."); *Nat'l Sec. Sys. v. Iola,* 700 F.3d 65, 94–95 (3d Cir. 2012) ("By expressly limiting liability under [§ 1106(a)] by reference to the exemptions in [§ 1108], then removing the same limiting principle from [§ 1106(b)], Congress cast [§ 1106(b)] as unyielding."). *See also Santomenno v. Transamerica Life Ins. Co.,* 316 F.R.D. 295, 308, 311 (C.D. Cal. 2016), *vacated on other grds*, 883 F.3d 833 (9th Cir. 2018) (following detailed study of § 1106(b) and all

exemptions listed in § 1108(b), court found that the only statutory exemption expressly mentioning an exemption to § 1106(b) was § 1108(b)(19), not at issue here: "the structure and the plain language of the statute provide strong evidence that the exemptions contained in § 1108 are referenced only in § 1106(a) and that is the only subsection to which they apply absent some other indication…. a fiduciary cannot pay itself out of the plan assets over which the fiduciary exercises its fiduciary duties – period."); *Acosta v. City Nat'l Corp.*, 922 F.3d 880, 886 (9th Cir. 2019) (holding § 1106(b) creates an absolute bar against self-dealing, even if "actual and legitimate services" were rendered.)

Finally, in their discussion of the Transition Policy "safe harbor" in which Defendants so heavily rely, Defendants also claim that its allegedly prohibited compensation is not being paid with "Plan assets," and therefore cannot be deemed to be self-dealing under § 1106(b). Defs.' Mem. at 16, ECF No. 41-1, PageID 214. For the reasons discussed in Part I.(A)(2), Defendants' capture of billions of dollars in operating capital and receipt of millions of dollars in compensation from the Plan assets they themselves transferred to their own general account, constitute indirect transfers of plan assets which are per se prohibited. Consequently, it is of no moment with respect to ERISA jurisprudence that Nationwide's fees are derived from Plan assets transferred by Defendants to the company's general account. *Id.* Many courts, including courts in the Sixth Circuit, construe the term "plan assets" broadly to protect participants, and deem such indirect transfers of Plan contributions as "plan assets". *See, e.g., Shirk*, 2008 WL 4449024, at *16-17; *Patelco Credit Union v. Sahni*, 262 F.3d 897, 908 (9th Cir. 2001); *Lowen v. Tower Asset Mgnt, Inc.*, 829 F.2d 1209, 1213, 1215 (2d Cir. 1987) ("[P]rotection of beneficiaries and notice to fiduciaries requires that § 1106(b) be broadly construed.... [because] Congress was apprehensive that exceptions to the common law rules against self-dealing were unduly eroding the underlying principle and included Section [1106] as a barrier to such erosion").

As a result, in determining whether a particular asset qualifies as a "plan asset," courts have adopted a "functional approach" in which they consider whether the asset "may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries." *Shirk*, 2008 WL 4449024, at *16-17 (quoting *Patelco Credit Union*, 262 F.3d at 908); *see also In re Regions Morgan Keegan ERISA Litig.*, 692 F. Supp. 2d at 960 (W. (citing cases following "functional approach" in determining what constitutes "plan assets"); *Haddock v. Nationwide Fin. Servs.*, 419 F. Supp. 2d 156, 168-71 (D. Conn. 2006) (deciding on summary judgment that fees received by Nationwide in exchange for services provided in connection with its fiduciary functions at the expense of a plan constitutes plan assets under functional approach). As noted, this is precisely what Plaintiffs have alleged here. Defendants do not dispute that the compensation earned by NLIC (and therefore by Nationwide itself) was only received by virtue of Defendants directing the Plan's investment in the Guaranteed Fund, allowing Nationwide to receive direct and indirect fees and other compensation from the Plan's investment in the Guaranteed Fund, and that these assets were used by Defendants for business functions. In other words, without Defendants' violation of their duty of loyalty to refrain from self-dealing, Nationwide would not have received over $1 billion in operating capital and the more than [redacted] in compensation challenged as prohibited transactions. FAC ¶¶ 67, 73, ECF No. 26, PageID 104, 106 .[12]

[12] Even if the Court were to credit Defendants' definition of "plan assets," this determination cannot affect Plaintiffs' prohibited transaction claims under § 1106(b)(3). Section 1106(b)(3) is broadly written and forbids a fiduciary from "receiv[ing] any consideration for his own personal account from any party dealing with such plan *in connection with* a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(3) (emphasis added). Thus, this provision covers a "broader swath of conduct" than § 1106(b)(1) because, although "[v]iolations of Section 1106(b)(3) must relate to transactions involving assets of the plan … the consideration received by the fiduciary need not itself constitute plan assets." *Haddock*, 419 F. Supp. 2d at 171; *see also Leimkuehler v. American United Life Ins. Co.*, 752 F. Supp. 2d 974, 986-87 (S.D. Ind. 2010) ("A violation of section 1106(b)(3) can occur in a less direct manner than self-interested dealing with plan assets proscribed in (b)(1).").

### B. Defendants' Asserted Prohibited Transaction Exemption to Plaintiffs' Section 1106(a) Claims is an Affirmative Defense, the Burden for Which Remains with Defendants.

Prohibited transaction exemptions are affirmative defenses that must be proven by Defendants. The merits of an affirmative defense are not considered on a motion to dismiss unless all facts necessary to establish the defense "appears clearly on the face of the complaint." *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 551 F. Supp. 580, 591 (S.D. Ohio 1982) (citing *McNally v. American States Insurance Co.,* 382 F.2d 748 (6th Cir.1967)); *Schmitt v. Nationwide Life Ins. Co.*, No. 2:17-CV-558, 2018 WL 4051835, at *2, n.1 (S.D. Ohio Aug. 24, 2018) ("ERISA plaintiff need not plead the absence of exemptions to prohibited transactions"). *See also Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 676 (7th Cir. 2016) (agreement with five other circuits that "§ [1108] exemptions are affirmative defenses, or that the defendant bears the burden of proof, or both").

Defendants concede that Plaintiffs are not required to plead Defendants' asserted prohibited transaction affirmative defense. Defs.' Mem. at 23-24, ECF No. 41-1, PageID 221-222. Instead, they wrongly claim that Plaintiffs have tacitly presented these facts through "mention[ing] [the] conditions" of Defendants' now asserted affirmative defense under § 1108(b)(5), arguing that this then allows the Court to rule – without the benefit of discovery – on whether the statutory exemption to plaintiffs' self-dealing allegations bars relief. Defs.' Mem. at 25, ECF No. 41-1, PageID 223. One of the requirements of the Section 1108(b)(5) exemption is that the Plan pays no more than "adequate consideration." 29 U.S.C. § 1108(b)(5). In *Chao,* the Sixth Circuit held that the definition of adequate consideration "imposes a two-fold requirement: (1) the price paid must reflect the fair market value of the asset, and (2) the trustee must conduct a careful and independent investigation of the circumstances prevailing at the time of the investment." 285 F.3d at 436 (quoting dissent in *Donovan v. Cunningham,* 716 F.2d 1455, 1467–68 (5th Cir. 1983)). As

explained in *Chao*, the procedural component of the adequate consideration requirement ("the process that led to the determination of fair market value in light of § 404's fiduciary duties") is derived from the "good faith" determination included in 29 U.S.C § 1002(18)(B). *Id.* at 437. Defendants cite this provision but ignore this procedural element of adequate consideration. *See* Defs.' Mem. at 25, ECF No. 41-1, PageID 223.

Accordingly, whether Defendant fiduciaries determined the fair market value in good faith requires factual detail concerning the process by which these fiduciaries determined fair market value, a determination that is necessarily fact bound. Such facts do not appear in the FAC; nor could they since these facts "tend systemically to be in the sole possession of defendants[.]" Braden, 588 F.3d at 598. *See also id.* at 602 ("It would be perverse to require plaintiffs bringing prohibited transaction claims to plead facts that remain in the sole control of the parties who stand accused of wrongdoing."); *Shirk*, 2008 WL 4449024, at *15 ("whether or not Defendants actually complied with [prohibited transaction exemption] PTE 77-3 (containing requirement materially similar to adequate consideration) is a factual question that cannot be resolved on a motion to dismiss"); *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 864 (4th Cir. 1994) ("[I]n order to avoid liability for a prohibited transaction under § [1106], [Defendant] bears the burden of proving the transaction was for adequate consideration in compliance with § [1108(e)]").[13] Consequently, the ERISA § 408(b)(5) exemption is inappropriate for resolution on a motion to dismiss.

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[13] Defendants' reliance on four district court decisions outside the Sixth Circuit is misplaced. (Defs'. Mem. at 24) (citing *Cervantes v. Invesco Holding Co. (U.S.), Inc.*, No. 1:18-cv-02551-AT, 2019 WL 5067202, at *14 (N.D. Ga. Sept. 25, 2019); *Patterson v. Morgan Stanley,* No. 16-cv-6568, 2019 WL 4934834, at *16 (S.D.N.Y. Oct. 7, 2019); *Mehling v. New York Life Ins. Co.*, 163 F. Supp. 2d 502, 510 (E.D. Pa. 2001)); and *Patterson v. Capital Grp. Companies, Inc.*, No. CV174399DSFPJWX, 2018 WL 748104, at *5 (C.D. Cal. Jan. 23, 2018). Plaintiffs in *Cervantes* specifically pled that exceptions to prohibited transactions did not apply. 2019 WL 5067202 at *14. In rejecting *Mehling*, its sister court in *Goldenberg v. Indel, Inc.*, 741 F. Supp. 2d 618, 632 (D.N.J. 2010), found "*Mehling* was not persuasive authority to depart from 'well-reasoned

Further, Defendants' reasoning that the FAC must sufficiently plead to an anticipated affirmative defense to satisfy the *Iqbal* pleading requirements, Defs.' Mem. at 23, ECF No. 41-1, PageID 221, would swallow up the uncontested rule that plaintiffs need not plead to an exemption to allege a prohibited transaction. The Seventh Circuit in *GreatBanc* expressly refused like arguments seeking to alter 29 U.S.C. §1108's burden of proof on the party to the self-dealing transaction. *GreatBanc*, 835 F.3d at 676-77 ("But the exemptions from prohibited transactions do not provide alternative explanations; they assume that a transaction in the prohibited group occurred, and they add additional facts showing why that particular one is acceptable. That is how affirmative defenses work"). It is Defendants that must present facts that the exceptions to ERISA prohibited transaction provisions are applicable.

Even if Plaintiffs were required to anticipate Defendants' Section 1108(b)(5) defense, Plaintiffs' allegations undermine the exemption. As it relates to showing the transaction was for adequate consideration, as discussed at length, *supra* Part IV, Plaintiffs allege that the Committee Defendants [REDACTED] FAC ¶ 71, ECF No. 26, PageID 105. Further, Defendants failed [REDACTED] FAC. ¶ 72, ECF No. 26, PageID 106.

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precedent'" that defendants bear burden of evidence for §1108 affirmative defense); *see also Krueger v. Ameriprise Fin., Inc.*, No. 11-CV-02781 SRN/JSM, 2012 WL 5873825, at *17 (D. Minn. Nov. 20, 2012) (finding that *Mehling* "did not discuss or attempt to distinguish any precedent identifying [29 U.S.C. §1108] and PTE 77–3 exemptions as affirmative defenses", and accordingly did not provide any reason to depart from this widely-held precedent. *Patterson v. Capital Grp. Companies, Inc.,* and *Patterson v. Morgan Stanley* both rely on the unsupported and wrongly decided opinion in *Mehling,* and in any event, are contrary to the court's teaching in *Shirk* that compliance with prohibited transaction exemptions are fact based and therefore not suitable for resolution on a motion to dismiss. *Shirk,* 2008 WL 4449024, at *15.

Should Plaintiffs prove these allegations following discovery, the Court would hold that Defendants failed to determine fair market value in good faith and cannot rely on the exemption for their admitted prohibited transaction. *See, e.g., Chao,* 285 F.3d at 437 (deficient process used to determine fair market value defeated finding of adequate consideration).

The FAC also contains allegations as to *Chao's* first requirement to show adequate consideration under the statutory exemption, i.e., that "the price paid must reflect the fair market value of the asset." *Chao,* 285 F.3d at 436. Plaintiffs allege that the contract allows Defendant Nationwide, through NLIC, free reign to set its own compensation and set returns at whatever level it deems appropriate. FAC ¶ 65, ECF No. 26, PageID 104. In other words, there is no negotiation with the Plan on what Nationwide will earn through the Plan's investment in the Guaranteed Fund (i.e., what Nationwide will earn with Plan assets), and because the Plan's earnings on the investment are dictated by Nationwide's determination of how much of the investment's returns will be split between itself and the Plan, there is no negotiation on what the Plan will receive from its Guaranteed Fund investment. As alleged, without the ability of the Plan to negotiate, [redacted]

[redacted] FAC ¶ 66, ECF No. 26, PageID 104. Plaintiffs allege – and Defendants do not dispute – that third parties negotiated better terms, at arm's-length, to invest in the same investment vehicle as the Plan, FAC. ¶ 69, ECF No.26, PageID 105 (Nationwide crediting unaffiliated retirement plans a higher rate, and that this higher rate would have earned the Plan tens of millions in additional retirement savings). Should the Court entertain Defendants' statutory exemption arguments at this stage, these allegations are sufficient to show that the Plan did not pay fair market value.

## CONCLUSION

For the foregoing reason, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint.

December 11, 2020

Respectfully submitted,

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**PROOF OF SERVICE**

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 1100 New York Ave. NW, Suite 500, East Tower, Washington, DC 20005.

On December 11, 2020, I served an unredacted copy of Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' Amended Complaint on all parties of record in this action by electronic means.

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