19-2263-cv

United States Court of Appeals

for the

Second Circuit

DEVIVO ASSOCIATES, INC, DENNIS J. DEVIVO,

Plaintiffs-Appellants,

– v. –

NATIONWIDE MUTUAL INSURANCE CO.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

WILLIAM P. TEDARDS, JR.
1101 30th Street, NW, Suite 500
Washington, DC 20007
(202) 797-9135

Attorney for Plaintiffs-Appellants

Dated: September 23, 2019

CORPORATE DISCLOSURE STATEMENT

DeVivo Associates, Inc. has no parent corporation, and no publicly-held corporation owns any of its stock.

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

(a) The district court had subject matter jurisdiction under 28 U.S.C. § 1332(a)(1) (diversity) in that there was complete diversity between all plaintiffs and all defendants when the case was filed.

(b) The district court entered a final judgment disposing of all issues between the parties. This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294(1). This appeal is taken from that judgment and an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

(c) The final judgment was entered on July 18, 2019. The notice of appeal was filed July 23, 2019. The appeal is timely under Federal Rules of Appellate Procedure 4(a)(1)(A).

STATEMENT OF THE ISSUES

[Plaintiff DeVivo Associates, Inc. is an insurance agency operating under a Corporate Agency Agreement with Defendant Nationwide Mutual Insurance Company.]

ISSUE 1. Whether the Amended Complaint states a claim for a declaration that Defendant Nationwide's decision not to pay DeVivo Associates' contractually-mandated deferred compensation payments breaches the Agency Agreement (Count 1 and, alternatively, Count 2).

ISSUE 2. Whether the Amended Complaint states a claim for a declaration that a restrictive covenant in the agency agreement will be unenforceable when Defendant Nationwide terminates the Agency Agreement on July 1, 2020 (Count 3).

APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE

ISSUE 1. The standard of review for ISSUE 1 is *de novo.*

ISSUE 2. The standard of review for ISSUE 2 is *de novo.*

STATEMENT OF THE CASE

Statement Pursuant to Local Rule 28.1

The Amended Complaint on behalf of Appellants DeVivo Associates, Inc., *et al*. (an insurance agency) alleges that Defendant Nationwide Mutual Insurance Company ("Nationwide") is committing two major breaches of Plaintiff DeVivo Associates, Inc.'s Agency Agreement -- reneging on contractually-mandated deferred compensation payments and weaponizing a forfeiture for competition clause as a coercive tactic. The Amended Complaint seeks declaratory and injunctive relief. The Amended Complaint also includes separate Fed. R. Civ. P. 23(b)(2) class allegations, directed to a putative class of similarly-situated agents, but there are no class issues involved in this appeal.

The individual action of DeVivo Associates, Inc. and Dennis J. DeVivo was dismissed for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). The decision was rendered by the Honorable Pamela K. Chen, Eastern District of New York.

The decision under appeal is the Judgment entered July 18, 2019 (APPX A-199) and the Order delivered from the bench on July 17, 2019 following oral argument. The argument, opinion, and order are in the Transcript of Proceedings, APPX A-97, *et seq*. The Opinion in the Transcript of Proceedings is Transcript 54:21 to 72:17 (APPX A-150 - A-168) and the Order in the Transcript of Proceedings is

Transcript 72:18 - 72:22 (APPX A-168).

Facts Which Are Relevant to the Issues Submitted for Review

1. Background

The Defendant Nationwide operates a property and casualty insurance business throughout the United States, distributing its insurance products through independent contractor agents. The company uses two forms of contract, called "exclusive" contracts and "independent" contracts. The essential difference between them is that agents using the "exclusive" contract have agreed to place their clients who are eligible for Nationwide insurance products exclusively with Nationwide. In exchange for that exclusivity and resulting high premium amounts flowing to Nationwide, the "exclusive" contracts contain major deferred compensation provisions, which increase over the life of the contract as the agent's business grows and are payable upon retirement or other cancellation of the contract. Agents using the "independent" contract do not make that commitment. They are free to place their clients who are eligible for Nationwide insurance products with Nationwide or with other carriers. With no exclusivity commitment, the agents using the "independent" contract do not have any corresponding deferred compensation provisions. (Amended Complaint ¶¶ 1 - 5 (APPX A-9 - A-10.)

2. Relevant Provisions of the DeVivo Plaintiffs' Corporate Agency Agreement

The Plaintiffs Dennis J. DeVivo (hereafter "Mr. DeVivo") and his insurance agency DeVivo Associates, Inc. sell Nationwide insurance products in the State of New York. DeVivo Associates, Inc. has an "exclusive" contract with Nationwide -- a Corporate Agency Agreement (hereafter, the "Agreement") -- which has been in effect from 1993 to the present. During the 26 years that Mr. DeVivo has been operating under the Agreement, the estimated premium amount that his clients have generated for Nationwide exceeds $100 million. (Amended Complaint ¶ 43 (APPX A-17) and Agreement (APPX A-30, *et seq*.).)

Under the Agreement, DeVivo Associates, Inc. is an independent contractor for all purposes, with full responsibility for developing and servicing its clientele and carrying out the provisions of the agreement, bearing all expenses of the business. (*Id*. ¶¶ 1 - 2, APPX A-31 - A-32.)

The Agreement's deferred compensation plan called Agency Security Compensation ("ASC"), consists of two components, "Extended Earnings" and "Deferred Compensation Incentive Credits" ("DCIC"). Extended Earnings is an amount equal to Mr. DeVivo's renewal service commissions over the last 12 calendar months preceding the contract cancellation. (Amended Complaint ¶ 47 (APPX A-18) and Agreement ¶ 11(b) (APPX A-33).) DCIC is an amount which accumulates year-by-year until age 65, with annual credits based on a percentage of Mr. DeVivo's

commission income. (*Id.* ¶ 11(a) (APPX A-33).)

Paragraph 11(f), titled "Cessation of Agency Security Compensation," is, essentially, a forfeiture provision stating that post-termination operation by Mr. DeVivo will result in loss of both components of his ASC package. (Amended Complaint ¶ 48 (APPX A-19) and Agreement ¶ 11(f) (APPX A-35 - A-36).)

Paragraph 11(h), titled "Amendments and Termination," states Nationwide's intent to continue the ASC Plan indefinitely, but reserves the right to amend or terminate the plan "to protect the Agency and Nationwide against unforeseen conditions," so long as rights or benefits "credited" prior to any change are preserved:

> Nationwide hopes and expects to continue the Agency Security Compensation Plan indefinitely, and every effort has been made to meet future conditions. In order to protect the Agency and Nationwide against unforeseen conditions, however, the right to amend or terminate this plan is necessarily reserved by Nationwide. Nationwide may terminate this plan by notification, at least sixty (60) days prior to such termination, in writing. No change in the Plan or termination, however, can alter or modify rights or benefits received or credited prior to such change or modification.

(Amended Complaint ¶ 49 (APPX A-19) and Agreement ¶ 11(h) (APPX A-36).)

The parties have the right to cancel the Agreement with or without cause. (Agreement ¶ 9 (APPX A-32) .) Upon cancellation, Nationwide has a nonexclusive right to continue to provide insurance services to Mr. DeVivo's clients and to continue to solicit them for additional business. (*Id.*)

The Agreement "define[s] the conditions governing the business relationship between the parties involved." (Agreement p.1 (APPX A-31)), "supersede[s] and take[s] the place of any prior Agreement" (*Id*. ¶ 18 (APPX A-37)), and "may be changed, altered, or modified only in writing signed by [Mr. DeVivo] and an officer of Nationwide." (*Id*. ¶ 16 (APPX A-36).)

3. Events Giving Rise to this Action

a. Termination of Exclusive Agent Agreements

On April 16, 2018, Nationwide announced a unilateral at-will termination of all its exclusive agent contracts, effective July 1, 2020. Specifically, Nationwide stated that "after July 1, 2020, Nationwide will no longer have exclusive agent contracts" and will "transition [its exclusive agents] to an independent agency distribution model." (Amended Complaint ¶ 27 (APPX A-14).)

b. Nationwide's ACE Program

In connection with the termination of the exclusive contracts and the switch to independent contracts, Nationwide is also pressuring the exclusive agents to enter into a separate program Nationwide has devised called the "Agent Contract Exchange" ("ACE") Program. Under that program, the exclusive agents would have to enter into separate contracts to ***purchase the right to operate as independent agents*** after Nationwide terminates the exclusive contracts on July 1, 2020, at a price calculated on the basis of an entire year's earnings, and also subject themselves to

severe restrictions which would keep them under Nationwide's control for years, even though they would be nominally classified by Nationwide as "independent." (Amended Complaint ¶¶ 28 - 30 (APPX A-14 and A-15).)

The ACE Program is presented as a set of three "options," with the cost of obtaining an independent contract calculated as a function of the agent's gross annual commissions at December 31, 2018. Each of the options is accompanied by a set of restrictive covenants which keep the agent under Nationwide's control for periods of years after supposedly becoming an independent agent. The restrictions and controls are more onerous and lengthy depending on how much it costs the agent to purchase the right to function as an independent agent. The more costly the purchase, the shorter the restrictions. (Amended Complaint ¶ 30 (APPX A-15) and Exhibit B - May 10, 2018 communication from Nationwide to the Exclusive Agents, Subject: "INFORMATION ABOUT RESTRICTIVE COVENANTS FOR ACE OPTIONS." (APPX A-38, *et seq*.).)

Nationwide's "independent agency distribution model" does not require the agent to purchase the right to sell for other carriers or place the agent under such restrictions. The right to represent multiple carriers with no restrictions is the defining feature of an independent contract. (Amended Complaint ¶ 31 (APPX A-15).)

c. Using Post-Cancellation Restrictions to Disable Mr. DeVivo

If an agent with an "exclusive" contract, such as Mr. DeVivo, resists Nationwide's pressure and refuses to select an ACE option, Nationwide states that when it terminates that agent's contract on July 1, 2020 it will "take their business." Explaining "take their business," Nationwide states the agent "will not be able to service that business or deal with those customers." Asked what would stop the agent from placing his clients elsewhere with other companies, Nationwide states that the exclusive contracts have "non-solicitation and/or non-compete clauses." (Amended Complaint ¶¶ 37 - 39 (APPX A-17).)

Nationwide specifies that "one of the restrictions we would look at" would be the forfeiture for competition provision in the ASC Plan, such as Mr. DeVivo's. Nationwide describes the forfeiture for competition provision as a type of "non-compete and non-solicitation" which would affect the agent's "access to his agency security compensation." (Amended Complaint ¶¶ 40 - 41 (APPX A-17).)

d. Eliminating Mr. DeVivo's Extended Earnings

When Nationwide first announced that it intended to stop giving Extended Earnings credits in the final year before the July 1, 2020 termination, it assured the exclusive agents that this was "a separate business decision from our transition from exclusive to independent agent contracts." At the time, Nationwide's explanation for

phasing out the credits in the last year of the exclusive contracts was that deferred compensation plans "are not part of contracts in the independent agent channel." (Amended Complaint ¶ 33 (APPX A-15).)

More recently, Nationwide announced flatly that an exclusive agent who wished to continue in business *would be denied his/her entire Extended Earnings unless the agent agreed to Option 1* -- the most expensive purchase option in the ACE Program. (Amended Complaint ¶ 36 (APPX A-16) and Exhibit B - "ACE Option 1 - Early Purchase," p. 2 (APPX A-40).) The deadline for selecting Option 1 was June 30, 2019. (Amended Complaint ¶ 34 (APPX A-16) and Exhibit B, p. 1 (APPX A-39).) Mr. DeVivo did not select Option 1.

The amount Mr. DeVivo would have had to borrow in order to select Option 1 of the ACE Program was approximately $870,000, to be paid to Nationwide in full by wire transfer. The amount of Mr. DeVivo's Extended Earnings is valued at $692,000. (Amended Complaint ¶¶ 44 - 45 (APPX A-18).)

Further, Mr. DeVivo would not have gotten the benefit of the Extended Earnings for years. That is because of the restrictions Nationwide has attached to the ACE options, keeping Mr. DeVivo tied to Nationwide, which range from a minimum of 5 years under Option 1 to virtually indefinite periods at the other end of the options. (*Id.*) Nationwide takes the position that IRC § 409A (controlling the payment of non-qualified deferred compensation ("NQDC")) applies to Extended Earnings

and, because § 409A prohibits payments of NQDC until a complete "separation from service" has occurred, Nationwide states that it will keep Mr. DeVivo's Extended Earnings until he finally escapes from the restrictions years into the future. (Amended Complaint ¶ 45 (APPX A-18) and Exhibit B, p. 2 (APPX A-40).)

SUMMARY OF THE ARGUMENT

Count 3

Count 3 of the operative Amended Complaint addresses Nationwide's announcement that, when it terminates the "exclusive" contract on July 1, 2020, it will enforce ¶ 11(f) of the Agreement -- the forfeiture for competition provision -- against Mr. DeVivo if he has failed to accept one of the ACE "options" (ISSUE NO. 2).

Nationwide recognizes the general rule in New York that an otherwise enforceable restrictive covenant is unenforceable where the company terminates without cause and that enforcement of this particular forfeiture for competition provision has been deemed to be "unreasonable as a matter of law" if Nationwide terminates the current Agreement at will.

Nationwide argues, however, that an exception to the rule applies because Mr. DeVivo has the opportunity to continue with Nationwide under an independent contract. But Nationwide is not willing to continue with an independent contract unless Mr. DeVivo separately enters the ACE Program, *i.e.*, ***purchases*** the right to

function as an independent agent, agrees to ***long-term restrictions*** tying him to Nationwide for many years, and ***foregoes his entire ASC package*** for the duration of those restrictions. That is not a "continuation" of his employment. That is a completely new, predatory business arrangement.

Nationwide maintains that this can nevertheless be deemed a continuation of Mr. DeVivo's current employment because, under the current exclusive contract, Nationwide is the sole owner of Mr. DeVivo's records concerning his clients, also called "policyholder information," and, therefore, has the right to charge Mr. DeVivo a heavy price for the right to continue to use the information after the July 1, 2020 termination. This claim that Nationwide is the exclusive owner of Mr. DeVivo's policyholder information is insupportable. The fully-integrated Agreement which governs the entire relationship between Mr. DeVivo and Nationwide does not allocate, assign, or even mention ownership of any form of policyholder information, much less allocate ***exclusive*** ownership to Nationwide.

Nationwide has no basis for claiming exclusive ownership of Mr. DeVivo's policyholder information, which has been confirmed by multiple judicial decisions against Nationwide during the 1990's and early 2000's, construing this same exclusive contract form. During the later 2000's Nationwide, reacting to decisions holding that Nationwide had no exclusive ownership interest in policyholder information, added new provisions to its new contracts intended to establish ownership. Nationwide is

citing these later contracts as authority in this case, but those new contracts and decisions based on them are not relevant in interpreting Mr. DeVivo's Agreement.

Paragraph 11(f) will also be unenforceable for the independent reason that Nationwide will have no "legitimate interest" to protect upon completion of the July 1, 2020 terminations. With all exclusive contracts terminated, it will no longer be possible for Mr. DeVivo to compete "unfairly" with Nationwide or its exclusive agents. Enforcement of this restrictive covenant in those circumstances will stifle only ***ordinary*** competition, not unfair competition.

Neither will policyholder information serve as a "legitimate interest" because Mr. DeVivo is the sole source of the policyholder information relevant to his clients. Use of a restrictive covenant to block him from using that information would constitute a misappropriation of goodwill created entirely through his efforts and at his expense.

Count 1

Count 1 addresses Nationwide's decision not to pay Mr. DeVivo's Extended Earnings (ISSUE NO. 1). Assuming, *arguendo*, that ¶ 11(h) of the Agreement reserves unfettered discretion to Nationwide to eliminate Mr. DeVivo's ASC benefits, Nationwide exercised that discretion arbitrarily and irrationally when it eliminated Mr. DeVivo's Extended Earnings because he did not select Option 1 of Nationwide's ACE Program, thus breaching the covenant of good faith and fair dealing.

Nationwide's action, destroying Mr. DeVivo's right to receive the fruits of his labor after 40 years of service, because he did not accept a new business deal, could not have been contemplated by the parties when the Agreement was drafted and violated Mr. DeVivo's reasonable expectation that Nationwide would perform its end of the bargain that was struck.

Count 2

In the alternative, Nationwide does ***not*** have unfettered discretion to eliminate Mr. DeVivo's Extended Earnings. The "unforeseen conditions" language in the second sentence of ¶ 11(h) of the Agreement is part of an exception that Nationwide carves out from the preceding prefatory statement of intent to continue the plan "indefinitely" making "every effort" to "meet future conditions": **"In order to protect you and the Companies against unforeseen conditions, however, the right to amend or terminate this plan is necessarily reserved by Nationwide."** The language "clarifies" the circumstances in which Nationwide might "necessarily" have to make a change, contrary to its stated intention, in order to "protect" both Mr. DeVivo and Nationwide. The action that Nationwide has taken to eliminate Mr. DeVivo's Extended Earnings because he did not select Nationwide's Option 1 has to comport with that clarified provision, and it does not.

Nationwide's action also breaches the fourth sentence of ¶ 11(h) which states:

> No change in the Plan or termination, however, can alter or modify rights or benefits received or credited prior to such change or modification.

(Agreement ¶ 11(h) (APPX A-36).) The clear implication is that, upon termination, the rights or benefits "credited" to Mr. DeVivo are kept in place, or frozen, just as credits and rights are frozen when ERISA and other benefit plans are terminated. This provision is susceptible to more than one interpretation, however, because the term "credited" is not defined or explained.

At the oral argument on this motion, Nationwide offered an interpretation that would suit its purposes, *i.e.*, that no "crediting" of Extended Earnings would occur until after the termination, which would have the practical effect of eliminating the benefit entirely. From Mr. DeVivo's point of view, a more reasonable interpretation is that this ***deferred compensation*** benefit (*i.e.*, compensation to which Mr. DeVivo is entitled, but to be paid later) would be frozen when Nationwide stopped giving credit on August 1, 2019, with the frozen amount to be paid upon termination a year later, thus avoiding a complete forfeiture of his Extended Earnings.

With the "unforeseen conditions" language in Sentence #2 and the ambiguous term "credited" in Sentence #4, and with the doctrine of "*contra proferentem*" applicable if the ambiguity cannot be resolved by extrinsic evidence, Count 2 should have been allowed to proceed.

ARGUMENT

Legal Standard

The district court dismissed all three counts of the operative Amended Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). This Court reviews Rule 12(b)(6) dismissals *de novo*, accepting all factual allegations as true. (*Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 321 (2d Cir. 2010).) The complaint must state a claim for relief that is "plausible on its face." (*Id*., citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 594, 570 (2007)), allowing a reasonable inference that the defendant is liable (*Id*., citing *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).)

I. COUNT 3 STATES A CAUSE OF ACTION -- NATIONWIDE IS NOT EXEMPTED FROM THE RULE THAT A RESTRICTIVE COVENANT IS NOT ENFORCEABLE FOLLOWING AN INVOLUNTARY TERMINATION WITHOUT CAUSE AND NATIONWIDE HAS NO LEGITIMATE INTEREST TO SUPPORT ENFORCEMENT OF A RESTRICTIVE COVENANT

Nationwide has announced a unilateral at-will termination of Mr. DeVivo's exclusive agent contract, effective July 1, 2020 and has stated that, if Mr. DeVivo does not enter the ACE Program and select one of the ACE options prior to the termination date, Nationwide will enforce ¶ 11(f) of Mr. DeVivo's Agreement. Paragraph 11(f) essentially states that Nationwide will not pay any of Mr. DeVivo's ASC benefits if Mr. DeVivo either (a) remains in operation as an insurance agent or

is in any way connected to the property and casualty or life insurance business during the next year within a 25-mile radius of his current location; or (b) directly or indirectly competes with Nationwide for the business of any Nationwide policyholder, at any time in the future. (Agreement ¶ 11(f) (APPX A-35 - A-36).)

As Nationwide describes it, the company will use the pressure of ¶ 11(f) to "take [his] business" by threatening his "access to his agency security compensation." (Amended Complaint ¶¶ 37 - 41 (APPX A-17).)

A. Paragraph 11(f) is not enforceable following an involuntary termination without cause.

The general rule in New York is that an otherwise enforceable restrictive covenant is unenforceable if, as here, the termination is involuntary and without cause. (*Design Partners, Inc. v. Five Star Elec. Corp*., 2016 U.S. Dist. LEXIS 41913 *; 2016 WL 1258474 at *42, citing *Cray v. Nationwide Mut. Ins. Co.*, 136 F. Supp. 2d 171 (W.D.N.Y. 2001); and *Post v. Merrill Lynch*, 48 N.Y.2d 84, 397 N.E.2d 358, 421 N.Y.S.2d 847 (N.Y. 1979).

The *Cray v. Nationwide* decision, construing this exact same provision, explained the rationale for the general rule as follows (citing *Post v. Merrill Lynch*):

> In *Post*, two account executives sued their former employer to recover pension benefits. The employer contended that the plaintiffs had forfeited the benefits when, after their termination without cause, they began working for a competitor. The Court of Appeals reversed the lower court's order granting summary judgment for the defendants, holding that "where an employee is

> involuntarily discharged by his employer without cause and thereafter enters into competition with his former employer, and where the employer, based on such competition, would forfeit the pension benefits earned by his former employee, such a forfeiture is unreasonable as a matter of law and cannot stand." *Id*. at 89, 421 N.Y.S.2d 847, 397 N.E.2d 358. In reaching that holding, the court reasoned that "[w]here the employer terminates the employment relationship without cause, ... his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer's ability to impose a forfeiture. An employer should not be permitted to use offensively an anticompetition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services."

(*Cray*, *supra* at 178.)

1. Nationwide does not have an exemption from the general rule in this case.

Nationwide recognizes the general rule but claims that it has an exemption. Noting that the rationale of the *Cray* decision need not be applied if the employer is willing to continue with the employment, Nationwide maintains that it is giving Mr. DeVivo a "meaningful choice" to "continue with employment" under an independent contract ***but only if*** Mr. DeVivo also agrees to one of the separate ACE options.[1] To justify adding the separate requirements of the ACE Program, Nationwide asserts that it has an "exclusive ownership interest in policyholder information" (July 11, 2019

[1]The ACE Program is completely separate from Nationwide's standard independent contract, which does not require agents to purchase anything or to agree to any restrictions tying them to Nationwide. (Amended Complaint ¶ 31 (APPX A-15).)

Nationwide letter to district court, p. 3 (APPX A-63) and states that "[w]hat Plaintiffs really want is to pay nothing for something they want to use, but do not own." (June 21, 2019 Nationwide letter to district court, p. 5 (APPX A-55).)

This claim that Nationwide is the exclusive owner of the policyholder information (in order to justify charging him up to $870,000 to keep using the information) is insupportable. The fully-integrated Agreement which governs the entire relationship between Mr. DeVivo and Nationwide does not allocate, assign, or even mention ownership of any form of policyholder information, much less allocate ***exclusive*** ownership to Nationwide. (Agreement, generally (APPX A-30, *et seq*.).)

This is understandable once one appreciates how this information is developed. Mr. DeVivo, an independent contractor, initially develops policyholder information from each of his clients through his own efforts and at his own expense, as mandated in the Agreement. (Agreement ¶ 1 (APPX A-31).) Nationwide has no role in this process. Then, if the client is eligible for Nationwide insurance, Mr. DeVivo provides the information to Nationwide in an insurance application. (*Id*.) That is how Nationwide learns the information. When the information is entered into the insurance policy, Mr. DeVivo gives Nationwide permission to bill the client directly to collect its premiums, to use his name on the bills, and to continue to use his name for a reasonable period following the cancellation of the Agreement. (Agreement ¶ 15 (APPX A-36).) Thereafter, Mr. DeVivo continues to use the information to service

the client and earn commissions, while Nationwide uses the same information to earn premiums and pay claims. (Agreement ¶ 1 (APPX A-31).)

Nationwide has no basis for claiming exclusive ownership of the policyholder information, which has been confirmed by multiple judicial decisions against Nationwide during the 1990's and early 2000's, construing this same exclusive contract form.

For example, in 1999 Nationwide commenced an action against a group of exclusive agents in Pennsylvania, who had resigned their agreements with Nationwide, taken their books of business with them, and begun to place their clients with other insurers. Noting that the agents had entered into exclusive agency agreements, Nationwide asserted, *inter alia*, that the agents had breached their contracts by taking policyholder information that belonged to Nationwide.

On cross-motions for summary judgment, the Western District of Pennsylvania, construing the same contract form that Mr. DeVivo has, denied Nationwide's motion with a comprehensive analysis concluding that Nationwide did not own the policyholder information. *Nationwide Mut. Ins. Co. v. Fleming*, 2001 U.S. Dist. LEXIS 26739 (W.D. Pa., Oct. 2, 2001). The analysis included references to corroborating decisions from other cases, including two Nationwide cases:

> [The Agents] note **[the Nationwide Companies] previously have argued to the United States Supreme Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S.**

> **318, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992), that the contract language in question does not give them an ownership right in the customer information** and assert that this prior litigation position substantially undermines and/or estops [Nationwide] from asserting a contrary position in the instant litigation.[2] [The Agents] also assert **various rulings by the court in *Nationwide Mutual Ins. Co. v. Stenger*, 695 F. Supp. 688 (D.Conn. 1988), long ago placed [Nationwide] on notice that the contract documents**, lease agreements and provisions of company policy in question **do not provide [Nationwide] with a proprietary or protectable interest in the information copied and retained by the defecting agent defendants**. [citations omitted]

Nationwide Mutual Ins. Co. v. Fleming at *21 (emphasis added).

With that background, the *Fleming* decision then presented its own comprehensive analysis, applying standard contract interpretation principles to the question at issue here -- whether the DeVivo contract form supports Nationwide's position that it owns the policyholder information -- and reached the following conclusions:

> **The agency agreements likewise do not vest in [Nationwide] ownership or the right to control dissemination of the names of customers generated through the agent defendants' efforts and expenses.**
>
> * * *
>
> **[T]he agency agreements did not explicitly or implicitly create a covenant providing [Nationwide] with**

[2]In *Darden*, Nationwide was fending off a claim that the agents should be classified as employees, rather than independent contractors, in order to protect their Extended Earnings and DCIC payments under ERISA. This led Nationwide to take a position for purposes of defeating that claim which directly contradicts the position it is taking in this case.

exclusive ownership of the names of policyholders generated and maintained by the agent defendants.

* * *

[T]he information copied by the agent defendants did not include actual manuals or underwriting information and guidelines utilized by plaintiffs. Instead, **the content consisted of information possessed by the insureds that could be obtained by merely requesting its disclosure from them. The policyholders had every incentive and right to disclose such information to entities offering competitive services in the market**. And those prior policyholders who elected to purchase competitive policies after the agent defendants terminated their relationships with [Nationwide] effectively authorized the disclosure of such information.

[Nationwide's] attempts to shoehorn such information into the protections afforded to certain property by various provisions of the contractual relationship between the parties is without persuasive force.

* * *

Policyholder information was not a "manual, form, record [or] such other material" supplied by [Nationwide] to the exclusive agents and as a result it does not fall within the provisions of paragraph one of the agent's agreement, which expressly retained [Nationwide's] ownership of such materials and supplies.

* * *

It is clear from the above that [Nationwide] may not maintain the claimed proprietary right in the copied information from the policyholder files to the extent the policyholders were developed or maintained at the agent defendants' efforts and expenses. It likewise follows a fortiori that [Nationwide] cannot maintain causes of action for post-termination competition based on the use of customer lists and policyholder information. Accordingly, summary judgment will be granted on Count V.

Nationwide Mut. Ins. Co. v. Fleming, *34 - *44 (footnotes omitted) (emphasis added).

For purposes of its ACE Program, Nationwide has invented a new term, called "policy assets," to describe the policyholder information, apparently trying to suggest that the policies have some intrinsic "asset" value which Nationwide owns. This gambit is a nonstarter. First, Nationwide is not the "owner" of an insurance policy. The owner is the policyholder, who has purchased the policy with premium payments and can, for example, change or cancel the policy at any time. *See*, *e.g.*, *Black's Law Dictionary* 1345 (10th ed. 2014):

> **policyholder.** (1818) Someone who owns an insurance policy, regardless of whether that person is the insured party. – Also termed *policyowner*.

Second, the fully-integrated Agreement between Mr. DeVivo and Nationwide, which "defines the conditions governing the business relationship between the parties" (Agreement p. 1 (APPX A-31) and "supersedes" any other agreement or understanding (Agreement ¶ 18 (APPX A-37), does not mention the term "policy assets" or purport to allocate or assign any interest in same.

When all of this was discussed with the district court, the court expressed no disagreement, but concluded that Nationwide could nevertheless claim exclusive ownership of the policyholder information because that is "the nature" of the arrangement:

THE COURT: I do not understand why the policies themselves and ownership of those do not have some value. Because you simply say it costs 800-and-some thousand dollars to buy them, he has only going to get 685,000 in extended earnings, but the value of the policies he also gets. And so why is that not part of the equation?

MR. TEDARDS: If you look at Mr. DeVivo's contract, there is nothing in that contract whatsoever that assigns ownership of anything called policy assets or policy information to any party. And if you understand how the process works, it's easy to see why that's not there.

The way the process works is Mr. DeVivo goes out, develops clients, determines who might -- or will be a good Nationwide client, sends the information on his client to Nationwide in the form of an insurance application.

THE COURT: Okay.

MR. TEDARDS: That is how Nationwide learns who the client is and what the relevant information is about them.

THE COURT: Okay.

MR. TEDARDS: At that point, they have the information. Mr. DeVivo has the information and he's the one that gave it to them. Then they proceed forward and Nationwide earns premiums from the insurance policy that Mr. DeVivo's generated for them, and Mr. DeVivo earns commissions.

At no point in that process anywhere and at no point in Mr. DeVivo's contractual relationship is there any assignment or designation of ownership, and particularly, not exclusive ownership --

THE COURT: But I have to stop you.

MR. TEDARDS: -- through Nationwide.

> THE COURT: I have to stop you one minute.
>
> MR. TEDARDS: Yes.
>
> THE COURT: I think that is all correct, but that is because that is the nature of this agency agreement. He does not own the policies under this exclusive agency agreement, rather Nationwide has retained ownership ....

(Transcript of Proceedings 30:11 - 31:23 (APPX A-126 - APPX A-127).)

In a followup discussion to clarify that this is not an "ownership" contest -- under the Agreement, ***neither party*** exclusively owns the information -- the court appeared to understand but then turned immediately to other subjects:

> MR. TEDARDS: -- the exclusive agreement. Nationwide doesn't own it either. No one owns it.
>
> THE COURT: Oh, all right. But --
>
> MR. TEDARDS: That's what I'm trying to say. And, Your Honor, I can cite you to lengthy, well-documented decisions construing this contract and coming to that exact same conclusion.
>
> THE COURT: And the relevance of that is what; that no one owns them?
>
> MR. TEDARDS: That's right. Nationwide has been rejected whenever it's tried to say that this contract, this exclusive contract gives them ownership of anything, any kind of policyowner information. And it's also completely illogical because it isn't something that they had. It's something that Mr. DeVivo has that he provides them with so they can write an insurance policy.
>
> THE COURT: So your point is for Option 1, or in order to retain his extended earnings, he has to pay for

> property interests that do not exist, in a sense, or some property that does not really exist?
>
> MR. TEDARDS: That is part of the point. And I'm also saying that Nationwide has stated that, You are buying the right to, in essence, function as an independent, to be able to sell to other companies. You're not buying an asset. You're not buying any property. You're just buying the right to be an independent agent. That has been established by statements by Nationwide, yes.
>
> THE COURT: But that may be true. That might be a necessary corollary of terminating this exclusive agency agreement. [The Court turns to other subjects.]

(Transcript of Proceedings 32:14 - 33:18, APPX A-128 - APPX A-129.)

Relying on its assumption that, although not contained in or supported by the provisions of the parties' Agreement, Nationwide's claim of exclusive ownership of the policyholder information is nevertheless valid because it is in "the nature" of the Agreement, the district court gave Nationwide an exception from New York's general rule, stating that the terms of the ACE Program are "generally beneficial" to Mr. DeVivo, and show that Nationwide "continues to be willing to employ" Mr. DeVivo. (*Id*. 70:15 - 70:24 (APPX A-166).)

The district court's assumption is clear error. The agency Agreement is a fully-integrated contract which "define[s] the conditions governing the business relationship between the parties," "supersede[s]" all other agreements, and cannot be modified except "in writing signed by [Mr. DeVivo] and an officer of Nationwide." (*See* p. 7, *supra*.) The provisions of the Agreement do not establish that Nationwide

exclusively owns the policyholder information generated by Mr. DeVivo and, in fact, contradict Nationwide's claim of exclusive ownership. Those provisions cannot be overriden by an assumption on the part of the district court, *not accompanied by any evidence or authority*, that Nationwide's ownership claim is in "the nature" of the arrangement.

2. Nationwide Cannot Resurrect its Position by Citing Later Decisions Based on Altered Contracts.

During the 2000's Nationwide, reacting to decisions demonstrating that Nationwide had no exclusive ownership interest in policyholder information (such as *Darden, Stenger, and Fleming*), added various types of new provisions to its new contracts, intended to establish ownership. Nationwide alludes to these new contracts as evidence supporting its ownership claims, but those new contracts and decisions based on them are not relevant in interpreting Mr. DeVivo's Agreement.

An example is *Forbes v. Nationwide Mut. Ins. Co*., No. 14-cv-4944 (Ohio Ct. C.P. Apr. 27, 2017), which Nationwide included as Exhibit A to its reply letter of July 11, 2019 (APPX A-64, *et seq.*), stating that *Forbes* holds that Nationwide has an exclusive interest in policyholder information. (July 11, 2019 Nationwide letter to district court, p. 3 (APPX A-63).) The *Forbes* decision cites two provisions from Ms. Forbes' 2006 contracts. The first provision, which appears in an Agency Executive contract is as follows:

> **Article 9 - Conditions**
>
> A. **Agent Has No Ownership Interest in Policies, Renewals, or Expirations** – Agent agrees and understands that Agent will not have any ownership interest in the policies, renewals, or expirations of the policies written with Nationwide or through the Agent Choice Plus Network during Agent's tenure as an agent.
>
> (AE Agreement at Article 9.)

(*Forbes* Decision, p. 10 (APPX A-74).) That provision has no equivalent in Mr. DeVivo's Agreement.

The second provision, which appears in Ms. Forbes' 2006 agency agreement, is an altered version of ¶ 9 of Mr. DeVivo's Agreement. Here are the two versions side by side:

Mr. DeVivo's Agreement ¶ 9 (1993)	**Ms. Forbes' Agreement ¶ 11 (2006)**
Service to Customer Upon Cancellation. Upon cancellation of this Agreement, it is understood that Nationwide retains the right to continue to provide insurance services to any and all customers and to continue to solicit such customers for additional business.	**Service to Customer Upon Cancellation.** ***Consistent with the Companies' exclusive use and control of all expirations***, it is understood that upon cancellation of this Agreement, the Companies shall retain the ***exclusive*** right to continue to provide insurance services to any and all customers and to continue to solicit such customers for additional business.
(APPX A-32.)	(APPX A-74.)

Decisions based on new contract provisions that Nationwide created during the 2000's to support an ownership claim obviously do not apply to Mr. DeVivo's Agreement, but these new provisions do suggest a larger question: If it were true that Nationwide's exclusive ownership claims needed no contractual support because they were simply "the nature" of Mr. DeVivo's arrangement, **why did Nationwide have to make all these additions and adjustments to its later contracts?**

B. Paragraph 11(f) will also be unenforceable for the independent reason that Nationwide will have no legitimate interest to protect upon completion of the July 1, 2020 terminations.

In the restrictive covenant at issue, ¶¶ 11(f)(1) and 11(f)(3) of the Agreement state that Mr. DeVivo will forfeit his entire ASC package upon termination if:

> (1) Agency or Agency's principal either directly or indirectly, by and for themselves or as an agent for another, or through others as their agent, engage in or be licensed as an agent, solicitor, representative, or broker, or in any way be connected with the fire, casualty, health, or life insurance business within one year following cancellation within a twenty-five (25) mile radius of Agency's business location at the time of cancellation; or
>
> * * *
>
> (3) After cancellation of this Agreement, Agency, or Agency's principal or employees solicit or attempt to solicit existing policyholders at any time, or directly or indirectly induces, attempts to induce or assists anyone else in inducing or attempting to induce policyholders to lapse, cancel, or replace any insurance contract in force with Nationwide; furnish any other person or organization with the name of

> any policyholder of Nationwide so as to facilitate the solicitation by others of any policyholder for insurance or for any other purpose.

(Agreement ¶ 11(f)(1) and (3) (APPX A-35 - A-36).) In essence, Nationwide intends to put Mr. DeVivo *completely* out of business for a year and bar him from soliciting existing Nationwide policyholders indefinitely.

This restrictive covenant will be unenforceable as a matter of law when Nationwide cancels Mr. DeVivo's Agreement on July 1, 2020, not only for the reasons discussed above, but also because Nationwide will be unable to demonstrate that the restrictive covenant is necessary to protect any Nationwide legitimate interest. *See*, *e.g.*, *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388-389 (1999) (emphasis is the Court's):

> A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public (*see*, *e.g.*, *Technical Aid Corp. v. Allen*, 134 NH 1, 8, 591 A2d 262, 265-266; *Blake*, *op. cit.*, at 648-649; Restatement [Second] of Contracts § 188). A violation of any prong renders the covenant invalid.

Prior to the upcoming terminations of July 1, 2020, Nationwide might have been able to contend that it had a "legitimate interest" in protecting its exclusive agents from "unfair competition," but that will no longer be true as of July 1, 2020. As ¶ 80 of the Amended Complaint states, and as Mr. DeVivo has explained in the letter to the district court of July 3, 2019,

> Nationwide cites earlier cases that upheld section 11(f) before the mass terminations in this case. There, Nationwide was protecting its *exclusive* agents from competition. But when Nationwide terminates Mr. DeVivo's contract on July 1, 2020, it will also have terminated every other remaining exclusive agent, all of whom will be free to work with other carriers in open competition with Nationwide. It will no longer be possible for Mr. DeVivo to compete "unfairly" with Nationwide or its exclusive agents. Instead of its original purpose, the forfeiture for competition will now be used to stifle *ordinary* competition -- not unfair competition.

(July 3, 2019 DeVivo letter to district court, p. 5 (APPX A-60); Amended Complaint ¶ 80 (APPX A-25 - A-26).) *See*, *e.g.*, *American Institute of Chemical Engineers v. Reber-Friel Company*, 682 F.2d 382, 387-388 (2d Cir. 1982) (a restrictive covenant which does not protect against "unfair and illegal" competition but merely "insulate[s] the employer from competition" is not enforceable).

Finally, any argument Nationwide may offer that policyholder information could serve as a "legitimate interest" deserving protection will be invalid. It is undisputed that Mr. DeVivo, operating as an independent contractor under ¶ 1 of the Agreement, develops all of his clients and all of their policyholder information through his own efforts, bearing all expenses. Nationwide has no role in that process and knows nothing about the clients or their information until Mr. DeVivo places an insurance application, which Mr. DeVivo thereafter services, continuing to bear all of the expenses. (Agreement ¶ 1 (APPX A-9).) Any attempt by Nationwide to identify the policyholder information as a legitimate protectable interest will thus run afoul

of the cardinal principle that a company may not appropriate the goodwill of independent contractors or partners with whom it works. As the *BDO Seidman* decision explains:

> [I]t would be unreasonable to extend the covenant to personal clients of defendant who came to the firm solely to avail themselves of his services and only as a result of his own independent recruitment efforts, **which BDO neither subsidized nor otherwise financially supported as part of a program of client development. Because the goodwill of those clients was not acquired through the expenditure of BDO's resources, the firm has no legitimate interest in preventing defendant from competing for their patronage**. Indeed, enforcement of the restrictive covenant as to defendant's personal clients would permit BDO to appropriate goodwill created and maintained through defendant's efforts, essentially turning on its head the principal justification to uphold any employee agreement not to compete based on protection of customer or client relationships.

(*BDO Seidman* at p. 393 (emphasis added).)

Count 3 should have been allowed to proceed.

II. COUNT 1 STATES A CAUSE OF ACTION -- NATIONWIDE HAS EXERCISED PRESUMED CONTRACTUAL DISCRETION ARBITRARILY AND IRRATIONALLY

Assuming, *arguendo*, that ¶ 11(h) of the Agreement (p. 6, *supra*) reserves unfettered discretion to Nationwide to eliminate Mr. DeVivo's ASC benefits (as Nationwide and the district court contend), Nationwide exercised that discretion arbitrarily and irrationally when it eliminated Mr. DeVivo's Extended Earnings

because he did not select Option 1 of Nationwide's ACE Program. Nationwide's action, destroying Mr. DeVivo's right to receive the fruits of his labor after 40 years of service, just because he did not accept a new business deal, could not have been contemplated by the parties when the Agreement was drafted and violated Mr. DeVivo's reasonable expectation that Nationwide would perform its end of the bargain that was struck. *See*, *e.g.*, *Spinelli v. National Football League*, 903 F.3d 185 (2d Cir. 2018):

> Under New York law, "implicit in every contract is a covenant of good faith and fair dealing ... which encompasses any promises that a reasonable promisee would understand to be included." *New York Univ. v. Cont'l Ins. Co*., 87 N.Y. 2d 308, 318, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995) (internal citation omitted). "[N]either party to a contract shall do anything [that] has the effect of destroying or injuring the right of the other party to receive the fruits of the contract," or to violate the party's "presumed intentions or reasonable expectations." *ML/A-COM Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990) (citations omitted). "***Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion***." *Fishoff v. Coty Inc*., 634 F.3d 647, 653 (2d Cir. 2011) (internal quotations marks omitted).

(*Spinelli* at 205 (emphasis added).)

Relying on the principle that the implied covenant of good faith and fair dealing cannot be used to impose an obligation that is inconsistent with express contractual terms, the district court dismissed Count 1 with these statements:

> Nationwide has the right under its contract with Plaintiffs, its agency agreement, to terminate the extended earnings benefit with at least 60-days notice. And it also has the right to terminate the entire agency agreement with 30-days notice. Therefore, Plaintiffs' claims based on the implied covenant of good faith and fair dealing would, in effect, deny Nationwide the ability to terminate the extended earnings benefit as it's allowed to do under the agreement; and therefore, that claim, the claim of a breach of contract of the implied duty must fail.

(Transcript of Proceedings 68:12 - 68:22 (APPX A-164).)

Here the district court is overlooking the emphasized point in *Spinelli* above, that a reserved absolute power, ***assumed*** here for purposes of discussion, may not be exercised arbitrarily or irrationally. Mr. DeVivo's covenant claim does ***not*** negate or deny Nationwide's discretionary power, it ***assumes*** that power but alleges that Nationwide has exercised that power arbitrarily and irrationally.

The district court is also overlooking that court's formulation of the covenant of good faith and fair dealing, which applies to any act which subverts the contract ***without changing the express terms*** but "destroying ... the right of the other party to receive the fruits of the contract." *E.g.*, *Design Partners Inc. v. Five Star Elec. Corp*., 2016 U.S. Dist. LEXIS 41913 (E.D.N.Y. 2016) (March 29, 2016), *59.

Count 1 should have been allowed to proceed.

III. IN THE ALTERNATIVE, COUNT 2 STATES A CAUSE OF ACTION -- NATIONWIDE IS BREACHING THE EXPRESS PROVISIONS OF PARAGRAPH 11(h) OF THE AGREEMENT

Paragraph 11(h) of Mr. DeVivo's Agreement, under the heading "Amendments and Termination," states [each sentence is numbered for convenient reference]:

> **[#1]** Nationwide hopes and expects to continue the Agency Security Compensation Plan indefinitely, and every effort has been made to meet future conditions. **[#2]** In order to protect the Agency and Nationwide against unforeseen conditions, however, the right to amend or terminate this plan is ***necessarily*** reserved by Nationwide. **[#3]** Nationwide may terminate this plan by notification, at least sixty (60) days prior to such termination, in writing. **[#4]** No change in the Plan or termination, however, can alter or modify rights or benefits received or credited prior to such change or modification. (Emphasis added.)

Sentence #1 is the prefatory statement of ¶ 11(h), expressing the intent which underlies all of the provisions that follow -- to continue the ASC plan "indefinitely," making "every effort" to meet" future conditions." Sentence #2 is an operative provision reserving power to depart from the prefatory statement where necessary to protect Mr. DeVivo and the company against "unforeseen conditions." Sentence #3 imposes a 60-day written notification requirement if Nationwide decides to use the authority in Sentence #2 to terminate the plan.

Nationwide argues, and the district court has agreed, that the first half of Sentence #2 is a prefatory statement which should be *completely ignored* in the process of evaluating Nationwide's actions. This is belied, however, by Nationwide's

concession that the language it wants to ignore is actually "clarifying" the circumstances under which Nationwide might have to amend or terminate the plan, defining the term "necessarily" in the second half of Sentence #2. What creates the necessity? The need to protect Mr. DeVivo and Nationwide from unforeseen conditions. Deleting the "unforeseen conditions" language from Sentence #2, leaving the term "necessarily" undefined, creates an oxymoron which is unconscionable: the parties state their intent to keep the ASC plan in place, then Nationwide "necessarily" reserves the right to change the plan -- with no further explanation.

Regardless of whether the first half of Sentence #2 is classified as operative or prefatory, however, the clarifying language cannot be simply discarded and ignored. It is well established that a prefatory statement which clarifies an operative statement is a "permissible indicator of meaning." *Black's Law Dictionary* 1369 (10th ed. 2014), defining "prefatory-materials canon." *Cf.* 1 Joseph Story, *Commentaries on the Constitution of the United States*, § 459, at 326 (3d ed. 1858): a preamble "is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute." The same principles apply to contract provisions.

Here, the "unforeseen conditions" language defines the term "necessarily" in the reservation of power, and the actions Nationwide takes must comport with that definition. Thus, ¶ 11(h) expressly curtails Nationwide's authority to amend or

terminate the ASC Plan for any purpose inconsistent with protecting Mr. DeVivo and Nationwide from "unforeseen conditions."

Nationwide further argues, and the district court again has agreed, that the first two sentences of ¶ 11(h) can be ignored *completely* because Sentence #3 says Nationwide may terminate the plan on 60 days notice.

But Sentence #3 does not convey a separate new power unhinged from the rest of the paragraph. Nationwide's power to "terminate this plan" is conveyed by Sentence #2 and is qualified by the "unforeseen conditions" language in that sentence. Sentence #3 merely adds a 60-day written notice requirement if Nationwide opts to terminate. In any event, Nationwide has not terminated the ASC plan under that provision -- it is simply denying Mr. DeVivo his Extended Earnings because he did not accept Option 1 of the ACE Program.

Through much of the discussion at the July 17 hearing on the motion, the theory of the district court seemed to be that, since either or both of the parties could take more fundamental action -- such as terminating the entire Agreement -- Nationwide was therefore entitled to take the lesser action of arbitrarily denying Mr. DeVivo his Extended Earnings. See, e.g., the court's statement that Mr. DeVivo "could not have had a reasonable expectation in the continuation of the extended earnings program where either plaintiffs or Nationwide could have terminated the agency agreement at any time." (Transcript of Proceedings 68:23 - 69:3 (APPX A-

165 - A-166).) This is neither logical nor legal. The fact that both parties have a mutual right to terminate a contract does not automatically entitle one of those parties to ignore specific obligations in that contract.

Nationwide, cannot, however, ignore the fourth sentence of ¶ 11(h) which states:

> No change in the Plan or termination, however, can alter or modify rights or benefits received or credited prior to such change or modification.

(See p. 35, *supra*.) The clear implication is that, upon termination, the rights or benefits "credited" to Mr. DeVivo are kept in place, or frozen, just as credits and rights are frozen when ERISA and other benefit plans are terminated. This provision is susceptible to more than one interpretation, however, because the term "credited" is not defined or explained.

At the oral argument on this motion, Nationwide offered an interpretation that would suit its purposes, *i.e*., that no "crediting" of Extended Earnings would occur until after a termination. This would have the practical effect of eliminating the benefit entirely, because Nationwide, without terminating the plan, stopped giving credit for Extended Earnings on August 1, 2019. Thus, a person looking back after the July 1, 2020 termination would see no credit for Extended Earnings during the applicable 12-month period.

From Mr. DeVivo's point of view, a more reasonable interpretation of Sentence

#4 is that the Extended Earnings, which Nationwide concedes are a ***deferred compensation*** benefit (*i.e.*, compensation to which Mr. DeVivo is *entitled*, but to be paid later), would be frozen at the previous 12-month figure when Nationwide stopped giving credit on August 1, 2019. The frozen amount would then be paid upon termination a year later, thus avoiding a complete forfeiture of Mr. DeVivo's Extended Earnings. This interpretation of the word "credited" in Sentence #4 was presented to the district court (Transcript of Proceedings 18:1 - 18:16 (APPX A-114)) in response to Nationwide's interpretation, but the issue was sidestepped by the court with further references to Nationwide's right to cancel the entire plan and the parties' mutual right to cancel the entire Agreement: "remember, this is a mutually free agreement and Mr. DeVivo is also free under the agreement to terminate the agency agreement at any time, right?" (Transcript of Proceedings 24:25 - 25:4 (APPX A-120 - A-126).) The correct interpretation of the term "credited" remains unresolved at the district court level.

With the "unforeseen conditions" language in Sentence #2 and the ambiguous term "credited" in Sentence #4, and with the doctrine of "*contra proferentem*" applicable if the ambiguity cannot be resolved by extrinsic evidence, Count 2 should have been allowed to proceed.

CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated, the district court's decision to dismiss all three counts

of Mr. DeVivo's Amended Complaint for failure to state a claim is erroneous. The DeVivo Plaintiffs request an order reversing the district court's decision in its entirety, reinstating Counts 1, 2, and 3, and remanding this action to the district court for further proceedings consistent with the reversal.

DATED: September 23, 2019

Respectfully submitted,

/s/ William P. Tedards, Jr.

WILLIAM P. TEDARDS, JR.
1101 30th Street, NW, Suite 500
Washington, DC 20007
T: (202) 797-9135
E: BT@tedards.net

Counsel for Plaintiffs-Appellants
DeVivo Associates, Inc. and Dennis J. DeVivo

CERTIFICATE OF COMPLIANCE

The foregoing **BRIEF OF PLAINTIFFS-APPELLANTS** complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), and complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6).

The brief was prepared using the following properties:

1. the brief is double-line spaced;
2. its characters are proportionately spaced;
3. the typeface is Times New Roman with a 14-point size for the body of the brief and 12-point size for the footnotes;
4. the word processing software used is WordPerfect X9;
5. the total word count is 9,003 words.

DATED: September 23, 2019

/s/ William P. Tedards, Jr.

WILLIAM P. TEDARDS, JR.

CERTIFICATE OF SERVICE

I, WILLIAM P. TEDARDS, JR., hereby certify under penalty of perjury that on September 23, 2019, I caused a copy of the following documents:

1. **BRIEF OF PLAINTIFFS-APPELLANTS** and
2. **JOINT APPENDIX**

to be electronically filed with the Clerk of the Court using the CM/ECF system, thereby serving the following counsel of record:

Quintin F. Lindsmith
Ali I. Haque
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215

Elizabeth P. Kessler
Casteel E. Borsay
JONES DAY
325 John H. McConnell Boulevard, Suite 600
Columbus, OH 43215

DATED: September 23, 2019

/s/ William P. Tedards, Jr.

WILLIAM P. TEDARDS, JR.