19-2263-cv

In the United States Court of Appeals for the Second Circuit

DEVIVO ASSOCIATES, INC., DENNIS J. DEVIVO,

Plaintiffs-Appellants,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

On Appeal From The United States District Court
For The Eastern District of New York
Docket No: 1:19-CV-02593-PKC-JO

BRIEF OF DEFENDANT-APPELLEE
NATIONWIDE MUTUAL INSURANCE COMPANY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellee Nationwide Mutual Insurance Company ("Nationwide"), by and through its undersigned counsel, states that it does not have a parent corporation, and no publicly held corporation currently owns more than 10% of its stock.

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STATEMENT OF THE ISSUES

This appeal presents the following issues:

1. Whether Nationwide's exercise of its explicit right to amend deferred compensation benefits under the Agency Agreement constitutes an express breach of contract or a breach of the implied covenant of good faith and fair dealing?

2. Whether Nationwide's company-wide business decision to transition its exclusive agents to an independent agency model prohibits enforcement of the forfeiture provision explicitly provided for in the Agency Agreement?

STATEMENT OF THE CASE

A. Appellants Sign A Mutually Beneficial Agency Agreement With Nationwide.

Appellant Dennis J. DeVivo is president of DeVivo Associates, Inc. (collectively, "Appellants"). Mr. DeVivo has been an exclusive agent for Nationwide Mutual Insurance Company ("Nationwide") since 1976. (Amended Complaint, Doc. 10, ¶25 (APPX A-14) ("Compl.").) In 1993, he converted his agency from being an individual agency to a corporate agency when Appellant DeVivo Associates, Inc. ("DeVivo Associates"), entered into a "Corporate Agency Agreement" with Nationwide. (Compl., Ex. A (APPX A-30–A-37) ("Agency Agreement").) Mr. DeVivo signed the Agency Agreement as president of DeVivo Associates. (*Id.* (APPX A-37).)

B. The Agency Agreement Establishes An Agency Relationship.

The Agency Agreement establishes an agency relationship between DeVivo Associates and Nationwide and its affiliated companies (together referred to in the Agency Agreement as "Nationwide"). (*Id.* at ¶1 (APPX A-31).) Under the Agency Agreement, DeVivo Associates is an independent contractor, which is responsible for its own taxes and hires its own employees. (*Id.*) (*See also*, Compl., ¶46 (APPX A-18).) DeVivo Associates "represent(s) Nationwide exclusively in the sale and service of insurance," which means it "will not solicit or write policies of insurance in companies other than those parties to this Agency Agreement…without the written consent of Nationwide." (Agency Agreement, ¶4 (APPX A-32).)

C. The Agency Agreement Is Terminable Without Cause By Either Party.

The Agency Agreement provides that it may be cancelled by either party "with or without cause." Paragraph 9 of the Agency Agreement plainly states:

> "**Cancellation.** This Agreement shall be in force until cancelled by either party.
>
> …
>
> Further, *the Agency or Nationwide* have the right to cancel this Agreement *at any time with or without cause*, after written notice has been delivered to the other or mailed to the other's last known address."

(*Id.* at ¶9 (APPX A-32) (emphasis added).)

D. The Agency Agreement Provides Deferred Compensation Benefits For All Exclusive Agents.

The Agency Agreement also establishes deferred compensation benefits for exclusive agents, which Nationwide could modify or eliminate in its discretion upon proper notice. (*Id.* at ¶11 (APPX A-33).) These benefits, referred to as the "Agency Security Compensation Plan" ("ASC Plan") had two components: (1) Deferred Compensation Incentive Credits ("DCIC"), and (2) Extended Earnings.

(a) Extended Earnings

In Counts I and II, Appellants focus on the benefit known as Extended Earnings, described in paragraph 11(b) of the Agency Agreement. The amount of Extended Earnings is determined by the amount of renewal commissions paid to an agency over the twelve months preceding cancellation of the Agency Agreement. (*Id.* at ¶11(b) (APPX A-33).) (*See also* Compl. ¶32 (APPX A-15).) It can only be calculated upon cancellation of the Agency Agreement. (Agency Agreement, ¶11(b) (APPX A-33).)

(b) Deferred Compensation Incentive Credits

The other deferred compensation benefit is DCIC. (*Id.* at ¶11(a) (APPX A-33).) As Appellants explained to Judge Chen, "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." (Appellants' Supp. Ltr. Response, Doc. 27, 1 (APPX A-56).) In other words, it is a benefit credited to Appellants each year.

Both Extended Earnings and DCIC are subject to forfeiture under paragraph ¶11(f) of the Agency Agreement, which Appellants challenge in Count III.

E. The Agency Agreement Gives Nationwide The Explicit Right To Terminate Deferred Compensation Benefits.

After explaining the ASC benefits, the Agency Agreement makes clear that Nationwide can terminate deferred compensation benefits that have not yet been credited to an agent, provided it gives sixty days' notice. (Agency Agreement, ¶11(h) (APPX A-36).) Agency Agreement paragraph 11(h) states:

> Nationwide hopes and expects to continue the Agent Security Compensation Plan indefinitely, and every effort has been made 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. 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.

(*Id.* (emphasis added).) Paragraph 11(h) does not require Nationwide to give any reason for ending such benefits—it is a right "necessarily reserved" by Nationwide. (*Id.*)

F. The Deferred Compensation Benefits Have Always Been Subject To The Forfeiture Provision.

Appellants agreed in 1993 that any right to payment of the ASC deferred compensation benefits would be subject to forfeiture if they engaged in certain actions after termination of the Agency Agreement. (*Id.* at ¶11(f) (APPX A-36).) Paragraph 11(f) of the Agency Agreement clearly states:

> Cessation of Agency Security Compensation.
>
> All liability of Nationwide for Agency Security Compensation provided for in paragraph 11, and its subparagraphs shall cease and terminate in the event any one or more of the following shall occur:
>
> > (1) Agency or Agency's principal either directly or indirectly, by or 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 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 any time of cancellation; or
> >
> > (2) Agency fails to return in good condition, within ten days, all materials, records, and supplies furnished to Agency by Nationwide during the course of this Agreement, to gather with any copies thereof;
> >
> > or
> >
> > (3) After cancellation of this Agreement, Agency, or Agency's principal or employees solicit or attempt to solicit existing policy holders at any time, or directly or indirectly induces, attempts to induce, or assists anyone else in inducing or attempting to induce policy holders to lapse, cancel, or replace any insurance contract in force with Nationwide; furnish any other person or organization with the name of any policy holder of Nationwide so as to facilitate the solicitation by others of any policy holder for insurance or for any other purpose.

(*Id*. (APPX A-35–A-36).) As the district court noted, this provision "was sitting there in plain sight" for twenty-six years. (Transcript of Proceeding, Doc. 40, 41:10-11 (APPX A-137).)

Notably, paragraph 11(f) does not prohibit Appellants from operating an insurance agency within twenty-five miles of where their Nationwide agency is located. Nor does it prohibit Appellants from trying to persuade Nationwide policyholders to move their business to another company. Rather, paragraph 11(h) provides that *if* Appellants do these things, they forfeit their right to all deferred compensation benefits. (Agency Agreement, ¶11(f) (APPX A-36).) As Judge Chen noted:

> No one is saying to him you cannot compete. What they are saying to him is, [w]e are prepared to give you this valuable retirement benefit, but it has certain conditions. That is what they are saying. You can continue to compete, but if you do, and contrary to 11F, you will lose this valuable compensation package that we offered you from the start.

(Transcript of Proceeding 44:14-20 (APPX A-140).)

G. Nationwide Exercised Its Explicit Contractual Right To Phase Out Extended Earnings.

In April 2018, Nationwide exercised its discretion under the Agency Agreement to issue an amendment to the ASC Plan, specifically to phase-out Extended Earnings. (Compl., Ex. B (APPX A-39).) Appellants acknowledge that deferred compensation benefits like Extended Earnings are provided to exclusive agents, but not to independent agents. (Compl., ¶¶3-4 (APPX A-9–A-10).) They also acknowledge and accept that Nationwide is transitioning its exclusive agents to an independent agency model. (*Id.* at ¶62 (APPX A-21).) Consistent with that transition (explained more fully below) and as expressly permitted by paragraph 11(h), Nationwide amended its exclusive agent agreements so that, beginning August 1, 2019, Extended Earnings would phase out by July 1, 2020. (*Id.* at ¶¶32-34 (APPX A-15–A-16).) Nationwide well-exceeded the "floor for the notice requirement"—sixty days—by announcing the phase-out an entire year and three months before the phase-out was to start. (Transcript of Proceeding 21:23-22:7 (APPX A-117–A-118); Compl., Ex. B. (APPX A-39).)

Every exclusive agent, including Appellants, was given the option to obtain full Extended Earnings by canceling the Agency Agreement without cause before August 1, 2019. Appellants did not make that choice. Therefore, for every month that Appellants defer their decision after August 1, 2019, the Extended Earnings benefit is reduced, until it is gone by July 1, 2020. (Compl., ¶¶32–36 (APPX A-15–A-16).) This phase-out does not affect Appellants' accrued DCIC, which were credited to Appellants subject to the forfeiture provision in paragraph 11(f).

H. Appellants Have Several Choices With Nationwide's Decision To Transition All Exclusive Agents To An Independent Channel Through The ACE Program.

Also in April 2018, Nationwide announced the Agent Contract Exchange Program ("ACE Program"), through which it would transition all of its exclusive agents to an independent agency model. (*Id.* at ¶27 (APPX A-14); Ex. B (APPX A-39–A-41).) Unlike an exclusive agent who can only write policies for

Nationwide, independent agents are free to write for many insurance companies and, in fact, have no obligation to sell a single new policy for Nationwide. (Compl., ¶5 (APPX A-10).) Appellants do not challenge Nationwide's right to transition to an independent agency model, and acknowledge the opportunity Nationwide has offered to them. (*See id.* at ¶¶5, 31 (APPX A-10, A-15) ("The right to represent multiple carriers is a defining feature of an independent contract . . . .").)

Under the ACE Program, Nationwide's exclusive agents can select one of three different "options" by which to transition to an independent channel. (Compl., Ex. C (APPX A-43–A-44).) These options are:

	<u>Effective Date</u>	<u>Description</u>
Option 1	July 1, 2019	<u>Agent can purchase the Nationwide policies and policyholder data</u> (together, the policy assets) which the agent now only services, but does not own and cannot sell. Agent can then sell the policy assets or the entire agency without restriction after three years. Agent also keeps the full Extended Earnings benefit.
Option 2	July 1, 2020	<u>Nationwide simply transfers ownership of the policy assets to the agent at no cost</u>, but the agent receives a Form 1099 reflecting the receipt of a benefit of .7 of the fair market value of what is being transferred. Agent can then sell the policy assets or the entire

	Effective Date	Description
		agency without restriction after five years.
Option 3	July 1, 2020	Nationwide simply transfers ownership of the policy assets to the agent at no cost, but the agent receives a Form 1099 reflecting the receipt of a benefit of .35 of the fair market value of what is being transferred. Agent can then sell the policy assets or the entire agency without restriction after five years, except that Nationwide retains the permanent right to repurchase any remaining original Nationwide policies at the 1099 valuation.

(*Id*.; Compl., Ex. B (APPX A-39–A-41).)

Each of these options have different benefits and burdens. (*Id.*) (*See also* Compl., ¶30 (APPX A-15) ("The more costly the purchase, the shorter the restrictions.").) Option 1 involved a cash payment for policy assets, but allowed an agent to keep his/her Extended Earnings and had the shortest restrictions (with none exceeding three years). (Compl., ¶36 (APPX A-16).) Option 1 is no longer available (it expired July 1, 2019). (*Id.* at ¶35; Ex. C (APPX A-43).)

Appellants can still elect Options 2 or 3. Under either option, the same policy assets would simply be transferred to Appellants with no cash payment. (Compl., Ex. C (APPX A-43).) But, because the transfer of assets is a taxable event, Nationwide would be required to issue a Form 1099. Nationwide would therefore place a value of .7 times the fair market value of the ownership rights transferred for Option 2 and .35 times such value for Option 3. (*Id.*) Options 2 and 3 also come with restrictions for up to five years. (Compl., Exs. B and C (APPX A-39–A-41, A-43–A-44).) Only Option 3 carries a permanent restriction, which is simply that Nationwide can "repurchase remaining original Nationwide policies at the 1099 valuation." (Compl., Ex. B (APPX A-40).) For example, if after seven years, only 100 of the 1,000 original policies transferred to an agent remain, Nationwide retains the right to repurchase those 100 policies at the policy valuation set seven years earlier.

Appellants assert that, "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." (Opening Br. at 15.) That is misleading. Each restriction relates to the newly independent agent's ability to turn around and sell what they have just come to own—the policy assets. For example, under Options 2 and 3, an agent cannot sell the "policy expirations, renewal rights, and customer data" they acquired from Nationwide for five years. (Compl., Ex. B (APPX A-40).) Indeed, nothing in the Complaint (or its exhibits) shows that newly independent agents transitioned through the ACE Program are in any way "controlled" by Nationwide as to how they run their new independent agency, how they make their sales, what insurance carriers they seek appointments with, whose insurance products they sell, etc. It is undisputed that on the day an agent becomes independent after consummating one of the ACE options, the agent does not have to write a single policy for Nationwide ever again. That is a far cry from being under Nationwide's "control."

Appellants further assert that Nationwide is pressuring its exclusive agents into certain ACE options (Opening Br. at 16), but their own exhibit shows otherwise. After explaining the various ACE options to its agents, Nationwide made clear:

> YOU ARE NOT BEING DIRECTED TO CHOOSE ANY ONE OPTION OVER THE OTHER OPTIONS. YOU SHOULD MAKE THE BEST DECISION THAT SUITS YOUR AGENCY, YOUR BUSINESS GOALS AND RISK APPETITES. THIS DECISION IS YOURS AND YOURS ALONE.

(Compl., Ex. C (APPX A-43) (emphasis an original).) In addition, each exclusive agent (including Appellants) was given the choice not to elect an ACE option. And, if an exclusive agent decided not to transition to an independent channel, the agent still had two additional options:

> (1) <u>Cancel the Agency Agreement before August 1, 2019</u>. Agent receives the full Extended Earnings benefit plus the accrued DCIC benefit, if the forfeiture clause is not violated.
>
> (2) <u>Do nothing and be cancelled on or after July 1, 2020</u>. Agent receives the accrued DCIC benefit if the forfeiture clause is not violated, but Extended Earnings will have been phased out.

(Compl., Exs. B & C (APPX A-40, A-43).)

In sum, Appellants (and all exclusive agents) had *over a year* to consider, select, and plan for one of five choices. Appellants simply do not like their choices.

I. Another District Court Recently Rejected Substantially Similar Claims Brought By Appellants' Counsel.

Appellants are represented by the same counsel who recently represented another Nationwide agent in a similar lawsuit in the Western District of Virginia. *Potter Ins. Agency, Inc. v. Nationwide Mut. Ins. Co.*, 374 F. Supp. 3d 572 (W.D. Va. 2019). On Nationwide's motion, that court dismissed the plaintiffs' claims challenging the same amendment to Nationwide's exclusive agent agreements that is at issue in Counts One and Two here. *Id.* at 583. The court correctly held that the plain language of the Agency Agreement allows Nationwide to amend or terminate Extended Earnings at any time with proper notice. *Id.* at 578. The court further held that plaintiffs could have no reasonable expectation of a continuation of deferred compensation benefits, when the plaintiffs themselves could have decided at any time to terminate the Agency Agreement. *Id.* at 579. Appellants' counsel did not appeal that decision. Here, the district court agreed with the *Potter* court's ruling.

The main distinction between the complaint in *Potter* and the Complaint here is Count III. In *Potter*, Appellants' counsel expressly challenged Nationwide's ownership of policyholder information and assets. *Id.* at 580–582.

The parties filed competing motions for summary judgment on that very issue, but before the court could rule, Appellants' counsel voluntarily dismissed the case. A few months later, Appellants' counsel filed this case in the Eastern District of New York. Notably, the Complaint here does not bring a claim challenging Nationwide's ownership of policyholder information and assets. (Compl., ¶¶61-80 (APPX A-21–A-26).)

SUMMARY OF THE ARGUMENT

The district court correctly dismissed each of Appellants' claims: express breach of contract regarding paragraph 11(h) of the Agency Agreement (Count II), breach of the implied covenant of good faith and fair dealing regarding the same provision (Count I), and enforceability of the forfeiture provision in paragraph 11(f) (Count III).

I. The district court correctly dismissed Count II because Nationwide did not breach the express language of the Agency Agreement. Paragraph 11(h) of the Agency Agreement clearly states that "the right to amend or terminate [the ASC Plan] is necessarily reserved by Nationwide." It further provides that "Nationwide may terminate this plan by notification, at least sixty (60) days prior to such termination, in writing." Appellants attempt to read into this express right a condition that Nationwide can only amend or terminate the ASC Plan in order to protect the agency and Nationwide against unforeseen conditions. But the "unforeseen conditions" language in the Agency Agreement is prefatory—announcing a purpose but not limiting or expanding the scope of the operative clause. Two district courts have already rejected Appellants' misguided interpretation.

Appellants also ask this Court to find that the term "credited" as used in the Agency Agreement is ambiguous, calling into question Nationwide's express right to amend or terminate Extended Earnings specifically. But the term "credit" is used consistently throughout the agreement in reference to DCIC. Conversely, the Agency Agreement explicitly states that Extended Earnings—a non-DCIC benefit—are only calculated upon qualified cancellation of an agency. Because Extended Earnings are not even *calculated* until termination, the benefit cannot be *credited* before termination. In short, "credited" is a "fairly clear word" that is not applicable to Extended Earnings. The district court correctly dismissed Count II.

II. The district court also correctly dismissed Count I because Nationwide did not breach the implied covenant of good faith and fair dealing. Nationwide's decision to transition its exclusive agents to an independent agency model through the ACE Program and to separately phase out Extended Earnings after a year notice were both company-wide decisions. These decisions were not, as Appellants argue for the first time on appeal, arbitrary and irrational. Nationwide's actions were not targeted at Appellants or done in reaction to anything Appellants did or did not do. Nor did Nationwide's actions deprive Appellants of the fruits of their contract. In fact, as the district court recognized, by providing multiple options to its agents through the ACE Program and giving notice over a year before phasing out Extended Earnings, Nationwide gave Appellants *more* than they bargained for.

Similarly, Nationwide's actions did not violate Appellants' reasonable expectations. Nationwide exercised its explicit contractual right to amend and eventually terminate Extended Earnings. That right was always in the Agency Agreement, as was Appellants' right to terminate the agreement at any time. Thus, any expectation that Appellants may have had that Extended Earnings would continue indefinitely was unreasonable. The district court correctly dismissed Count I.

III. The district court correctly dismissed Count III because the forfeiture provision in the Agency Agreement is reasonable as a matter of law and nothing about the ACE Program changes its enforceability. A key component under New York law regarding the enforceability of restrictive covenants is choice. Here, Nationwide has afforded its agents choice at multiple levels. To start, despite Appellants' contrary mantra, the ACE Program is not an involuntary termination without cause. Nationwide is willing (and hoping) to continue to work with all of its exclusive agents. The ACE Program was therefore designed to continue an agency relationship, not to end it. The program provides several choices to transition to an independent channel and allows flexibility for each agent to make the best decision in light of his/her business goals. Or, an agent can choose not to transition and terminate its contract with Nationwide.

In that latter scenario, the agent would be bound by the forfeiture provision that has always been clearly stated in Nationwide's agency agreements. That provision also contains a choice. An agent may choose not to compete and preserve his/her benefits, or choose to compete and risk forfeiting those benefits. Under New York's employee choice doctrine, a restrictive covenant that affords that choice is reasonable as a matter of law. But further, the forfeiture provision is reasonable because it protects a legitimate interest. Indeed, the exact provision at issue here has been considered by numerous courts in this Circuit and elsewhere and upheld. The district court correctly dismissed Count III.

IV. Finally, Appellants attempt to distract this Court by presenting a number of arguments and facts that were not raised in their Complaint or letter briefing below, and therefore not fully considered by the district court. Most notably, Appellants spend a large portion of their Opening Brief arguing (incorrectly) that Nationwide does not own the policyholder information and assets that Appellants service. These new arguments should not be considered on appeal because they are irrelevant and have been forfeited.

Despite what Appellants now argue, ownership is not at issue in this case. Appellants bring three claims (as explained above)—none of which rise or fall on the issue of ownership. Appellants did not make a claim challenging ownership in their Complaint. Nor did they challenge ownership in their letter briefing. Only after Appellants realized that their claims were on the verge of dismissal by the district court did they challenge ownership at oral argument. By that time, their argument had been waived. While the district court briefly entertained Appellants' remarks, it agreed that the question of ownership was never properly raised and, more importantly, that it was irrelevant. As such, refusal by this Court to address the issue will not result in any injustice. Appellants' new arguments are simply an improper attempt to reframe this litigation and salvage their dismissed claims, which they cannot do.

ARGUMENT

I. NATIONWIDE'S ACTIONS ARE EXPRESSLY PERMITTED UNDER THE AGENCY AGREEMENT.

The district court correctly dismissed Count II because Nationwide did not breach the express provisions of paragraph 11(h) of the Agency Agreement. Paragraph 11(h) is clear:

> 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.

(Agency Agreement, ¶11(h) (APPX A-36).) Appellants' reading of this provision has been quickly rejected by two district courts, who found that (1) the "unforeseen conditions" language is clearly prefatory and does not change the operative sentence, and (2) Extended Earnings are not "credited" until a termination date is decided.

A. The Prefatory Clause In Paragraph 11(h) Does Not Limit The Operative Sentence.

Appellants argue that the "unforeseen conditions" language in paragraph 11(f) limits Nationwide's authority to amend or terminate the ASC Plan. (Opening Br. at 43–44.) In doing so, Appellants shifted their argument from characterizing this language as a condition precedent, to arguing that the entire second sentence is an operative sentence. (*Id.* at 42–43; Transcript of Proceedings 59:9-23 (APPX A-155).) Appellants' reason for doing so is clear—any argument that the "unforeseen conditions" language is a condition precedent fails. (*See* below.) But, whether they use the words or not, Appellants are substantively asking this Court to interpret the "unforeseen conditions" language as a condition precedent. (*See* Transcript of Proceedings 60:1-61:14 (APPX A-156–A-157) ("I do not think you can avoid the interpretation that it is a condition precedent if what you are saying is in order for Nationwide to act on its authority, that it has to have or has to be able to explain or identify some unforeseen circumstance. . . . Under New York law, a condition precedent is an act or event other than a lapse of time which, unless the condition is excused must occur before a duty to perform a promise in the agreement arises." (citation omitted)).)

As explained by this Court, "[c]onditions precedent are not readily assumed. While specific, talismanic words are not required, the law nevertheless demands that conditions precedent be expressed in unmistakable language." *Bank of New York Mellon Tr. Co., N.A. v. Morgan Stanley Mortg. Capital, Inc.*, 821 F.3d 297, 305 (2d Cir. 2016) (internal citations omitted). Courts "are not free to rewrite into a contract conditions the parties did not insert by adding or excising terms under the guise of construction." *Id.* at 307 (internal quotations omitted).

Two district courts have read paragraph 11(h) and determined that the "unforeseen conditions" language is not a condition precedent, but rather a prefatory clause that "clearly announces a purpose rather than limiting or expanding the scope of Nationwide's reservation of the right to amend or terminate the extended earnings benefit." (Transcript of Proceedings 64:12-25 (APPX A-160).) *See also Potter Ins. Agency, Inc.*, 374 F. Supp. 3d at 577 (The "language relied upon by plaintiffs is clearly prefatory" and "does not impose a condition precedent to Nationwide's contractual right to terminate the [] Extended Earnings benefits upon 60 days' notice.") (citing *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) ("But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.")). Nationwide is not arguing that the prefatory clause in paragraph 11(h) be "completely ignored" (Opening Br. at 42), just that it not be elevated to impose restrictions upon Nationwide that were never bargained for.

Relatedly, Nationwide's position (to which both district courts adhered), is that the operative clause in the second sentence—"the right to amend or terminate this plan is necessarily reserved by Nationwide"—is confirmed by the third sentence—"Nationwide may terminate this plan by notification, at least sixty (60) days prior to such termination, in writing." (Agency Agreement, ¶11(h) (APPX A-36).) *See also Potter*, 374 F. Supp. 3d at 578 ("[T]he operative clause is confirmed by the ultimate sentence…."); Transcript of Proceedings 64:18-22 (APPX A-160) (finding that the "common sense reading" of the of the second sentence "reinforces the point that at the end of the day, Nationwide has the right and retains the right to amend or terminate the extended earnings benefit without limitation").

Finally, after stumbling through a convoluted interpretation of paragraph 11(h), Appellants off-handedly state that "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." (Opening Br. at 44.)

That is both illogical and disingenuous. Nationwide announced that it would be eliminating all non-DCIC deferred compensation (*i.e.*, Extended Earnings), as permitted by the Agency Agreement, and gave *over a year* notice. (Compl., Ex. B (APPX A-39).) Nationwide also explained how an agent could still receive Extended Earnings. For example, any agent who voluntarily cancelled his/her agreement before July 30, 2019, or who elected Option 1 of the ACE Program before June 14, 2019, would have received his/her full Extended Earnings. (Compl., Ex. C (APPX A-43).) And, any agent who cancels his/her agreement after July 30, 2019, but before July 1, 2020, will receive some Extended Earnings in accordance with the announced phase-out plan. (*Id.*) Appellants had all the same options—they just chose not to take them.

B. Extended Earnings Are Not Credited Until A Termination Date Is Decided.

Likely recognizing that their interpretation of paragraph 11(h) fails, Appellants then ask this Court to read ambiguity where none exists by arguing that the term "credited" as used in the Agency Agreement is "susceptible to more than one interpretation." (Opening Br. at 45.) It is not. Despite not being explicitly defined, the word "credit" is used consistently throughout the agreement, always in reference to DCIC and not Extended Earnings. For example, paragraph 11(a) sets forth "Computation of Deferred Compensation Incentive Credits," explaining that Nationwide will "*credit* to your account" certain percentages of earnings. (Agency

Agreement, ¶11(a) (APPX A-33) (emphasis added).) Conversely, paragraph 11(b) sets forth "Extended Earnings Payable Upon Qualified Cancellation as an Agency," explaining how the benefit *will be calculated* "upon qualified cancellation of the Agency." (*Id*. at ¶11(b) (APPX A-33) (emphasis added).) The Extended Earnings benefit, therefore, cannot be credited to an account before the amount of earnings is determined. To read otherwise is illogical.

Indeed, even Appellants' own explanation of the ASC Plan notes that DCIC is an amount which "accumulates year-by-year until age 65, with annual *credits*…[,]" whereas Extended Earnings is an amount "equal to Mr. DeVivo's renewal service commissions over the last 12 calendar months *preceding the contract cancellation*." (Opening Br. at 12.) In other words, Appellants recognize that Extended Earnings cannot be calculated—and therefore cannot be credited—prior to termination of the Agency Agreement.

Furthermore, contrary to Appellants' assertion, interpretation of the term "credited" does not remain "unresolved" at the district court level. (Opening Br. at 46.) The district court heard Appellants' arguments and ruled against them. It explained that "credited" is a "fairly clear word" that is "not applicable to the extended earnings, because nothing can be credited until it is actually earned, and nothing can be earned until a date for termination is decided. . . . And I think the lengths to which you have to go to try to explain it that way, to me, reinforce the notion that that is not a plain or fair reading of that actual provision." (Transcript of Proceedings 28:1-13 (APPX A-124).)

Ultimately, as the district court recognized, Appellants' "fundamental problem" is that "the language of the agreement allows [Nationwide] to do this"—*i.e.*, cancel the ASC Plan with sixty days' notice. (*Id.* at 37:10-12 (APPX A-133).)

II. Nationwide's Actions Are Consistent With The Implied Covenant Of Good Faith And Fair Dealing.

The district court also correctly dismissed Count 1, because Nationwide did not breach the implied covenant of good faith and fair dealing. New York law implies in every contract a covenant of good faith and fair dealing "pursuant to which neither party to a contract shall do anything, which has the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 407 (2d Cir. 2006). But, "the implied covenant does not extend so far as to undermine a party's general right to act on its own interest in a way that may incidentally lessen the other party's anticipated fruits from the contract." *M/A-COM Sec. Grp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990) (internal quotations omitted).

Nationwide's exercise of its explicit contractual right was not arbitrary or irrational, nor did it violate Appellants' reasonable expectations. Indeed, if Appellants' theory were to succeed, it would deprive Nationwide—not Appellants—of the fruits of the contract (*i.e.*, the ability to terminate the ASC Plan as Nationwide is allowed to do under the plain language of the Agency Agreement).

A. Nationwide's Exercise Of Its Explicit Contractual Right Was Neither Arbitrary Nor Irrational.

Appellants argue, for the first time on appeal, that Nationwide's actions were "arbitrary and irrational." (Opening Br. at 39–41.) Because Appellants failed to raise this argument to the district court, it has been forfeited. *See Carlos v. Santos*, 123 F.3d 61, 68 (2d Cir. 1997) (holding that arguments not raised below were waived); *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) (same). But, more importantly, Appellants' argument is wholly unsupported by the record and contrary to well-established precedent.

First, Appellants provide no explanation—in either the Complaint or Opening Brief—as to *why* Nationwide's actions were arbitrary or irrational, nor could they. That alone is a sufficient basis to affirm dismissal of Count I. *See, e.g.*, *Bibicheff v. Chase Bank USA*, No. 2:17-cv-4679 (DRH)(AYS), 2018 WL 4636817, at *5 (E.D.N.Y. Sept. 26, 2018) (granting a motion to dismiss plaintiff's implied covenant of good faith and fair dealing claim because plaintiff did not allege any facts which tended to show that defendants' actions were arbitrary or irrational); *Sveaas v. Christie's, Inc.*, No. 10 Civ. 4263(LTS), 2011 WL 1560826, at *6 (S.D.N.Y. Apr. 20, 2011) (same).

Second, Appellants' argument is contrary to well-established precedent. Courts in this Circuit have held that, '[f]or an action to be 'arbitrary' it must be 'without sound basis in reason and generally taken without regard to the facts.'" *Bibicheff*, 2018 WL 4636817, at *4 (internal quotations omitted). Similarly, the term "irrational" has been defined as "unreasonable, foolish, illogical, absurd." *Toledo Fund, LLC v. HSBC Bank USA, Nat. Ass'n*, No. 11 CIV. 7686(KBF), 2012 WL 2850997, at *6 (S.D.N.Y. July 9, 2012) (citing Black's Law Dictionary at 829 (6th ed. 1990)). Nationwide's decision to phase out Extended Earnings after a year notice, at the same time it transitions its exclusive agents to an independent agency model, fits neither of those definitions. Or, to use the district court's words, "the circumstances of this case are vastly different than the situations where there has been a breach [of the implied covenant] found." (Transcript of Proceedings 39:2-4 (APPX A-135).)

Appellants cite *Fishoff v. Coty, Inc.*, 634 F.3d 647 (2d Cir. 2011) and *Spinelli v. Nat'l Football League*, 903 F.3d 185 (2d Cir. 2018)—two often cited cases for establishing what constitutes arbitrary and irrational conduct in the Second Circuit. Both are distinguishable and prove that Nationwide's actions did not rise to the level of being arbitrary or irrational. In *Fishoff*, for example, the plaintiff enrolled in the company's long-term incentive plan that consisted of stock acquired over three offerings. 634 F.3d at 649–651. After plaintiff gave notice of his intent to exercise his option and sell his stock, the defendant cut its share price by 50% to devalue plaintiff's stock options. *Id.* at 653. The court found that the defendant's decision violated the duty of good faith and fair dealing because it was a "seemingly arbitrary post hoc valuation, which was applied *only* to [the plaintiff's options] and only *after* [the plaintiff] exercised his options." *Id.*

Here, Nationwide spent considerable time and resources to implement a national business decision to transition *all* of its exclusive agents—not just Appellants—to an independent channel, provided multiple pathways for this transition to take place, and gave its agents over a year to determine which option (if any) each agent wanted to pursue. (*See* Compl., Exs. B & C (APPX A-39–A-44).) Nationwide also gave a year notice (when only sixty days' notice was required), that it planned to phase out Extended Earnings for *all* agents. (*Id.*) Nationwide's actions were not "seemingly arbitrary," were not done in reaction to anything Appellants did or did not do, and were not targeted at Appellants.

Spinelli is similarly inapposite. There, seven sports photographers brought suit against the National Football League ("NFL") and the Associated Press ("AP") after the AP granted a broad complimentary license to the NFL for its use of thousands of photos owned by the contributing photographers. 903 F.3d 185. The court held that the defendants' actions were arbitrary and irrational because "AP secretly granted the NFL a license for complimentary and unfettered use of thousands of plaintiffs' photographs, and in doing so sought (unsuccessfully) to excuse thousands of completed acts of copyright infringement." *Id.* at 205. Thus, the defendants deprived plaintiffs of their fruits of the contract by licensing plaintiffs' photographs in a way that benefited the AP but "yield[ed] little to no value for [p]laintiffs." *Id.* Notably, the contract did not explicitly state that the AP had the right to "give [p]laintiffs' photographs away for free," and the court refused to read into the contract an "implied term [that] defeats a right that a party actually bargained for…." *Id.* at 206.

But here, the Agency Agreement *explicitly grants* Nationwide the right to amend or terminate the ASC Plan upon proper notice. (*See* Agency Agreement, ¶11(h) (APPX A-36).) Appellants were also not left with "little to no value," because the Agency Agreement contains numerous other benefits and Appellants were given multiple options—including options to maintain their full Extended Earnings. Appellants were not deprived of the fruits of the contract. As the district court recognized, Appellants arguably got *more* than they bargained for because Nationwide went above and beyond what it was contractually required to do:

> [There is no breach of the implied duty of good faith and fair dealing in part] because they are offering options. They may be options Mr. DeVivo does not like and some are better than others, but he had an ability to retain his extended earnings. He chose not [to] do that…. I think if anything, the fact that there is some way of preserving these extended earnings is not something required by the agreement….[it] mitigates the unfairness and really undercuts this notion that they are

> acting out of a bad purpose or breaching any implied duty of good faith.

(Transcript of Proceedings 37:17-39:5 (APPX A-133–A-134).) (*See also id.* at 43:10-14 (APPX A-139) ("I just do not see how enforcing less than in some ways what the plain terms allow them to do can be viewed as unfair because they could have exercised this in a much harsher fashion just because of the way the contract is written.").) Nationwide's actions were far from arbitrary or irrational.

B. Nationwide's Exercise Of Its Explicit Contractual Right Did Not Violate Appellants' Reasonable Expectations.

Appellants further argue that Nationwide's actions "could not have been contemplated by the parties when the Agreement was drafted and violated Mr. DeVivo's reasonable expectation…." (Opening Br. at 40.) Two district courts have correctly rejected this argument.

It is true that, "[t]he boundaries set by the duty of good faith are generally defined by the parties' intent and reasonable expectations in entering the contract." *Cross & Cross Prop. Ltd. v. Everett Allied Co.*, 886 F.2d, 497, 502 (2d Cir. 1989). But here, Appellants cannot say, in good faith, that they reasonably expected deferred compensation to continue indefinitely when the Agency Agreement clearly gave Nationwide the right to terminate the benefits with sixty days' notice and, more importantly, when Appellants also had the right to terminate the agreement at any time. *See Potter*, 374 F. Supp. 3d at 579 ("There can be no reasonable expectation of a continuation of the retirement package, when the plaintiffs themselves could have decided at any time to terminate the Agency Agreement."); Transcript of Proceedings 68:23-69:3 (APPX A-164–A-165) ("[P]laintiff 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 under the express terms of the contract."); *id.* at 25:1-3 (APPX A-121) ("Remember, this a mutually free agreement and Mr. DeVivo is also free under the agreement to terminate the agency agreement at any time[.]"). To the extent Appellants thought the deferred compensation plan was unchangeable, those expectations were unreasonable.

C. Appellants' Theory, If True, Would Negate Nationwide's Explicit Rights Under The Contract.

Finally, the implied covenant of good faith and fair dealing has its limits. As this Court has explained, "the implied covenant of good faith cannot create duties that negate explicit rights under the contract." *LJL 33rd St. Assocs., LLC v. Pitcairn Prop., Inc.*, 725 F.3d 184, 195 (2d Cir. 2013). The Agency Agreement provides Nationwide the explicit right to terminate the ASC Plan with sixty days' notice. (*See* Agency Agreement, ¶11(h) (APPX A-36).) (*See also* Section I.) "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 68:17-22 (APPX A-164).) *See also LJL*, 725 F. 3d at 196 ("The mere fact of [Nationwide's] decision to exercise its contractual right, absent bad faith conduct, cannot be deemed a breach of its duty to deal with [Appellants] in good faith.").

III. Nothing About The ACE Program Changes The Enforceability Of The Forfeiture Provision.

The district court also correctly dismissed Count III because the forfeiture provision in Appellants' Agency Agreement is reasonable as a matter of law and nothing about the ACE Program changes its enforceability. Appellants attempt to defeat the forfeiture provision by mischaracterizing the ACE Program as an involuntary termination without cause, ignoring the choice inherent in the contract, and distancing this case from numerous others that have upheld the very same provision.

A. The ACE Program Is Not An Involuntary Termination Without Cause.

Appellants argue that the ACE Program is a "unilateral at-will termination" and therefore the forfeiture provision in paragraph 11(f) of the Agency Agreement is not enforceable. (Opening Br. at 23–25.) This is an odd choice of words where, as noted above, the Agency Agreement is *mutually* terminable at will. Appellants' argument also ignores a key element of the ACE Program—choice. Nationwide is not involuntarily terminating its exclusive agents through the ACE Program.

Rather, Nationwide seeks to transition all of its exclusive agents to an independent agency model and offers several pathways for its agents to do so. (Compl., Exs. B & C (APPX A-39–A-44).) In other words, Nationwide hopes to continue its relationship with its agents, through a means of its agents' choosing, while also providing them greater rights and freedoms. Appellants mischaracterize the program as an involuntary termination simply because they do not like their options.

Appellants cite three cases in support of their position: *Cray v. Nationwide Mut. Ins. Co*., 136 F. Supp. 2d 171 (W.D.N.Y. 2001), *Post v. Merrill Lynch*, 397 N.E.2d 358 (N.Y. 1979), and *Design Partners, Inc. v. Five Star Elec. Corp.*, No. 12-CV-2949 (PKC)(VMS), 2017 WL 818364 (E.D.N.Y. Mar. 1, 2017). Each of these cases actually support dismissing Appellants' claims, as the district court agreed.

In *Cray*, for example, the court analyzed the same forfeiture provision at issue here. In doing so, the court implied that *if* the plaintiff agent were terminated without cause,[1] with no option to continue selling Nationwide policies, the forfeiture provision would not be enforceable. 136 F. Supp. 2d at 178–79. *Cray*

[1] In *Cray*, there was a factual dispute that could not be resolved on the motions for summary judgment about whether or not the agent was terminated for cause for breaching his agency agreement. 136 F. Supp. 2d at 179. Such a factual dispute does not exist here.

relied on *Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 397 N.E.2d 358 (N.Y. 1979) to note that, "an employer should not be able to use a non-compete agreement offensively by terminating an employee without cause and then using the agreement both to end the employee earned compensation or benefits, and to prevent him from engaging in his chosen livelihood...." *Id.* But, the court also noted that "the court's holding in *Post* was limited to cases involving termination *without cause*." *Id.* at 178 (emphasis in original).

This same sentiment was echoed by the court in *Design Partners*. Citing *Cray* and *Post* (among other cases), the court concluded that it would be unfair for an employer to enforce a non-compete clause "where—through no fault of the party covenanting not to compete—the employer is *no longer willing to employ that party*." 2017 WL 818364, at *13 (emphasis added). Thus, what is central under New York law is choice. An employer cannot take from an employee (without cause) the choice to continue employment and the ability to engage in his/her chosen livelihood elsewhere.

Here, Nationwide is not taking away its agents' choice. In fact, Nationwide is giving its exclusive agents several choices to continue an agency relationship with Nationwide as an independent agent. And, if an agent choses to leave Nationwide, he/she still has the choice to not compete and preserve certain benefits or to compete and risk forfeiting those benefits. (*See* Section III.B.1.) No matter what, Nationwide is not preventing its agents from "engaging in [their] chosen livelihood." *Cray*, 136 F.Supp.2d at 179.

Nationwide is willing (and hoping) to continue to work with all of its exclusive agents. It has provided multiple options for its agents to transition to an independent channel, thereby allowing them flexibility to "make the best decision that suits your agency, your business goals and risk appetites." (Compl., Ex. C (APPX A-43).) Therefore, the ACE Program cannot be construed as an involuntary termination or analogized to a constructive discharge. (*See* Transcript of Proceedings 77:18-21 (APPX A-173) ("[I]t cannot be construed as a constructive discharge because there are options through which the plaintiffs can actually maintain some working relationship with Nationwide as an independent agent."); *id.* at 70:20-24 (APPX A-166) ("[B]ecause the terms of the ACE program are flexible and appear generally beneficial to transitioning agents, I do not believe that the announced transition amounts to an involuntary termination or could be analogized to a constructive discharge.").) Appellants' first argument against enforceability fails.[2]

[2] Appellants spend ten pages of the involuntary termination portion of the Opening Brief arguing about policy ownership, which is a complete red herring. (Opening Br. at 25–36.) Not only are those arguments forfeited (*see* Section IV), but Appellants do not explain how policy ownership changes the analysis of whether or not the ACE Program constitutes an involuntary termination. It does not. (*See* Transcript of Proceedings 53:22-24 (APPX A-149) (district court

B. The Forfeiture Provision Is Reasonable And Enforceable.

Appellants next argue that the forfeiture provision in paragraph 11(f) of the Agency Agreement is unenforceable because it is unreasonable—specifically because, *after the ACE Program transition is complete*, Nationwide will no longer have a legitimate protectable interest. Appellants' argument fails for two main reasons: (1) it ignores well-established New York law regarding the employee choice doctrine, and (2) it fails to accept that the forfeiture provision has been upheld by numerous courts for decades and provides no logical basis for this Court to otherwise rule.

1. <u>Paragraph 11(f) Is Enforceable As A Matter Of Law Under The Employee Choice Doctrine.</u>

New York case law is clear:

> New York courts disfavor restrictive covenants in the employment context and will generally enforce them only to the extent they are reasonable and necessary to protect valid business interests. There is, however, one salient exception: New York District Courts will enforce a restrictive covenant *without regard to its reasonableness* if the employee has been afforded the choice between not competing (and thereby preserving his benefits) or competing (and thereby risking forfeiture).

Lucente v. Int'l Bus. Mach. Corp., 310 F.3d 243, 254 (2d Cir. 2002) (internal citations omitted) (emphasis added). *See also Cray*, 136 F. Supp. 2d at 179 (The employee choice doctrine provides that "an employee who receives benefits

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agreeing with Appellee's counsel that policy ownership "ultimately does not matter").)

conditioned on not competing with the conferring employer has the choice of preserving his benefits by refraining from competition or risking forfeiture of such benefits by exercising his right to compete.").

The forfeiture provision at issue here has that choice: do not compete and preserve your benefits or compete and risk forfeiting those benefits. (*See* Agency Agreement, ¶11(f) (APPX A-35–A-36); Transcript of Proceedings 79:16-19 (APPX A-175); *id.* at 78:20-23 (APPX A-174) ("[T]he way this agreement is structured it does not require anyone not to compete. It is just that you lose your extended earnings benefit if you violate 11F."); *id.* at 44:9 (APPX A-140) ("No one is saying to him you cannot compete. What they are saying to him is, [w]e are prepared to give you this valuable retirement benefit, but it has certain conditions.").) Indeed, the Second Circuit has analyzed the very provision at issue and held that:

> Section 11(f) simply permits [the agent] to compete without foregoing his 'agency security compensation,' so long as he does so in accordance with Section 11(f)'s requirements. No permissible reading of this section, however, commands that Nationwide provide [the agent] with the means to compete. Such a reading requires inferences beyond what could have reasonably been intended by the contract.

Thyroff, 460 F.3d at 408. Therefore, paragraph 11(f) is enforceable as a matter of law.

The district court correctly concluded that the discussion should end there. (*See* Transcript of Proceedings 78:17-79:19 (APPX A-174–A-175) (finding an "inher[ent] flaw" in Appellants' "ordinary" v. "unfair" competition argument because "the way this agreement is structured is it does not require anyone not to compete….They have a choice between not competing and preserving their benefits or competing and risking losing or forfeiting those benefits. That seems to have been upheld as perfectly reasonable in both *Lucent* and *Thyroff*.").) But, for the sake of completeness, Nationwide will also address the reasonableness of paragraph 11(f) as if the employee choice doctrine does not exist (despite it being conclusive here).

2. Paragraph 11(f) Is Reasonable Because It Protects A Legitimate Interest.

Under New York law, a straight restrictive covenant (void of any choice) is reasonable only if it is "(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[.]" *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1223 (2d Cir. 1999). Appellants argue that Nationwide does not have a legitimate protectable interest under two theories: (1) that Appellants developed all of their clients and policyholder information with no aid from Nationwide, and (2) that once all exclusive agents are gone, any competition by Appellants would become "ordinary." (Opening Br. at 37–39.) Both theories fail.

First, the notion that Appellants developed all of their clients and policyholder information with no aid from Nationwide is patently false. In support of this claim, Appellants cite paragraph 1 of the Agency Agreement. This provision states that Nationwide will provide Appellants with "certain manuals, forms, records, and such other materials and supplies as are necessary in the conduct of an insurance business," as well as "training, counsel, and guidance based upon its accumulated experience in the sale and servicing of business…." (Agency Agreement, ¶1 (APPX A-31).) The Agency Agreement also states that Nationwide is "investing in a computerized transaction and record-keeping system with our agency force." (*Id.* at ¶12 (APPX A-36).) This system, known as Agents Office Automation (AOA), "is designed to assist the agent and ultimately reduce expenses." (*Id.*) Appellants had access to and utilized all of these provisions. Not to mention that Appellants were selling *Nationwide insurance policies*—policies backed by a well-known, reputable company.

According to Appellants' own case, *Am. Inst. of Chem. Eng'rs v. Reber-Friel Co.*, 682 F.2d 382, 389 (2d Cir. 1982),[3] this is the "clearest case" of a

[3] In *Reber-Friel*, this Court affirmed the district court's decision that the restrictive covenant at issue was not enforceable, but under very different facts than exist here. 682 F.2d at 388–390. There, the party against which the covenant was sought to be enforced had not profited unfairly from the goodwill of another because it had brought to the "joint effort years of experience in the trade show management business, its business connections and its excellent reputation." *Id.* at 389. The customer information at issue was also "gathered from publicly available

legitimate protectable interest. There, this Court explained that a restrictive covenant is enforceable if it is used "to prevent a former employee from unfairly profiting from the goodwill of the employer … [where it is] apparent that the goodwill [is] indeed an asset of the employer[,]" particularly where the former employee's business is "directly attributable to his association with his former employer." *Id.* at 389. The "clearest case" is one of a "salesman whose acquisition of goodwill is dependent on the past and future performance of the product or service being sold." *Id.* As explained above, that is precisely the case here.

Second, nothing about the implementation of the ACE program changes the reasonableness and enforceability of the forfeiture provision. Appellants acknowledge that "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" (the date any remaining exclusive agent contracts are cancelled). (Opening Br. at 37.) Yet it is unclear how transitioning its agents from exclusive status to an independent agency model also transforms Appellants' potential capitalization on goodwill acquired from Nationwide from "unfair" to "ordinary" competition. That characterization of

sources, and for the most part consist[ed] of well-known national corporations in the petroleum industry." *Id.* at 388. The circumstances here are entirely distinct, but the standard articulated by this Court remains applicable.

competition is dependent on Appellants' conduct, not Nationwide's business model. And, regardless of what Appellants do, other agents are buying or will receive policy assets.[4]

It should also be noted that paragraph 11(f) has been in Nationwide agency agreements for decades and numerous courts, in this Circuit and others, have consistently upheld it as reasonable and enforceable. *See*, *e.g.*, *Keding v. Nationwide Ins. Cos.*, No. 95-cv-25, 1997 WL 698036, at *4 (N.D.N.Y. Oct. 31, 1997) ("The noncompetition clause in the Agreement is reasonable because it applies only to a 25–mile radius of an agent's current business location and endures for one year."); *Cray*, 136 F. Supp. 2d at 179 ("[T]he restrictions here-no competition for one year within a twenty-five mile radius of plaintiff's business location at the time of cancellation-are reasonable.").[5] "Accordingly, even if [Appellants] lack a meaningful choice to continue employment with Nationwide,

[4] To the extent Appellants argue that Nationwide does not have a legitimate protectable interest because it allegedly does not own policyholder information, that argument fails because it has been forfeited (*see* Section IV), and because it is irrelevant. S*ee Thyroff*, 460 F.3d at 407 (finding that the ownership right to policyholder information did not resolve interpretation of the same forfeiture provision); (Transcript of Proceedings 53:22-24 (APPX A-149)).

[5] *See also, e.g.*, *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245 (6th Cir. 1989); *Plazzo v. Nationwide Mut. Ins. Co*., 892 F.2d 79 (6th Cir. 1989); *Fraser v. Nationwide Mut. Ins. Co*., 334 F. Supp. 2d 755 (E.D. Pa. 2004); *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.*, 714 N.E.2d 898 (Ohio 1999); *Ralston v. Nationwide Mut. Ins. Co.*, No. 23336, 2007 WL 397313 (Ohio Ct. App. Feb. 7, 2007), and *Gearhart v. Nationwide Mut. Ins. Co*., No. 27396, 2015 WL 446846 (Ohio Ct. App. July 22, 2015).

they remain bound by the reasonable terms of the forfeiture provision." (Transcript of Proceedings 72:14-17 (APPX A-168).)

In the end, Appellants are just trying to run from paragraph 11(f). But, as the district court noted, "[t]hat was always part of the agreement… [it] was sitting there in plain sight." (Transcript of Proceedings 41:7-11 (APPX A-137).) To nullify the provision now "would deprive Nationwide of the benefit of its bargain. This was a negotiated part of its agreement to give what might be described as a generous deferred compensation plan." (*Id.* at 46:5-9 (APPX A-142).) The forfeiture provision in Appellants' Agency Agreement should be upheld.

IV. Appellants' New Arguments Are Irrelevant And Have Been Forfeited On Appeal.

Appellants rely on new arguments in their Opening Brief in an attempt to shift the focus of this litigation. Most notably, Appellants devote more than ten pages of their brief to new arguments regarding the ownership of policyholder information and policy assets despite never bringing a claim challenging ownership or even addressing ownership in their Complaint.[6] (Opening Br. at 19–

[6] Ownership is not the only new argument Appellants raise. For the first time on appeal, Appellants cite a series of cases requiring that parties to a contract not exercise their discretion in an "arbitrary" or "irrational" manner. (Opening Br. at 39–41.) (*See* Section II.A.) Appellants also assert new facts in their brief that are not in the record below. For example, Appellants assert a new, one-sided description of how DeVivo develops and maintains relationships with policyholders, and conveniently exclude any discussion of the Nationwide systems and goodwill upon which he relies. (*Id.* at 19–20.)

20; 26–34.) Appellants' new arguments are irrelevant to resolving the three claims actually articulated in their Complaint (as explained above) and, nonetheless, have been forfeited by Appellants' failure to properly raise them below.

A. Ownership Is Irrelevant To Appellants' Claims.

Appellants' Complaint sets forth three claims, none of which depend on ownership of the policy assets. (*See, generally*, Compl. (APPX A-9–A-29).) Ownership of policy assets has nothing to do with whether Nationwide breached the covenant of good faith and fair dealing when it amended all exclusive agent agreements to phase out Extended Earnings (Count I). Ownership of policy assets has nothing to do with Appellants' claim for express breach of contract based on such phase out of Extended Earnings (Count II). And ownership of policy assets has nothing to do with the enforceability of the forfeiture clause in Section 11(f) of the Agency Agreement (Count III). Each of Appellants' claims can be (and were) resolved without regard to ownership issues. As the district court noted, "I'm not sure it actually matters … Like I said, [] to me, it ultimately does not matter[.]" (Transcript of Proceeding 53:22-23 (APPX A-149).) Certainly, if ownership were key to their claims, Appellants would have challenged it in their Complaint or in their letter briefing. They did not.

B. Appellants Forfeited Their Ownership Arguments By Failing To Properly Raise Them Below.

The law is clear: arguments not properly raised in the district court are forfeited, or waived, on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Varrichio and Assocs. v. Chicago Ins. Co.*, 312 F.3d 544, 547 (2d Cir. 2002) (deeming new arguments on appeal to be forfeited); *Carlos*, 123 F.3d at 68 (arguments not raised below were waived). And while the doctrine of forfeiture can be discretionary, *Gutman v. Klein*, 515 F. App'x 8, 9 (2d Cir. 2013), courts in the Second Circuit consistently do not entertain new arguments on appeal. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d at 132 ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.") (quoting *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006)).[7] Indeed, discretion is not necessary where the

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[7] *See also Zahoruiko v. Fed. Ins. Co.*, 717 F. App'x 50, 51 (2d Cir. 2018) (The appellant forfeited his argument "by failing to raise it in the district court.") (citing *Harrison v. Republic of Sudan*, 838 F.3d 86, 96 (2d Cir. 2016)); *Maresca v. City of New York*, 514 F. App'x 37, 40 (2d Cir. 2013) ("[The appellant] has forfeited this argument because he did not present it below.") (citing *Virgilio v. City of New York*, 407 F.3d 105, 116 (2d Cir. 2005)); *Michaelidis v. Berry*, 502 F. App'x 94, 96 (2d Cir. 2012) ("Because this argument was not raised in the district court, we might well deem it forfeited."); *Boimah v. Cumberland Farms, Inc.*, 239 F. App'x 632, 633 (2d Cir. 2007) ("[The appellant's] attempt to revive his abandoned claims in the Court is ineffective because the failure to raise the claims in the district court waives them on appeal."); *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) ("We reject this contention because it was not raised

forfeiting party fails to explain its decision not to present the argument below and will not suffer injustice if the Court declines to hear the argument. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d at 132–33 ("[W]e conclude that [the appellant] has waived the argument by failing to present it below…. Under the circumstances of the case, we decline to exercise our discretion where [the appellant] has offered no reason for its failure to raise the argument to the district court. Moreover, our refusal to address the issue will not result in any injustice.") (internal citations omitted).

Here, Appellants failed to properly raise a claim regarding ownership of policy assets to the district court and have offered no explanation to excuse their forfeiture. Appellants did not challenge ownership of the policy assets in their Amended Complaint—the words "own" or "ownership" are never used. (*See, generally*, Compl., (APPX A-9–A-29).) And none of the claims Appellants assert in their Complaint rely on ownership, as the district court agreed. (*See* Transcript of Proceeding 53:22-24 (APPX A-149) ("Like I said, [] to me, it ultimately does not matter and I, too, did not think that there was an argument about that.").)

Appellants could have brought a claim about ownership if they had wanted to. In fact, such claims are not foreign to Appellants' counsel who explicitly made

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in the district court and because [the appellant] has failed to present any reasonable ground for its consideration by this Court.").

a claim about ownership in *Potter*, the predecessor litigation brought by Appellants' same counsel in the Western District of Virginia. *See Potter Ins. Agency Inc.*, 374 F. Supp. 3d at 580. Appellants did not make those same claims in this case. (*Compare* Compl. at ¶¶64-80 (APPX A-22–A-28), *with* Compl. for Declaratory and Injunctive Relief, *Potter Ins. Agency Inc. v. Nationwide Mut. Ins. Co.*, No. 2:18CV00021, at *15–16 (W.D. Va. July 9, 2018), ECF No. 1 (Count 3, titled "Charging For The Book Of Business" alleging "Nationwide has no contractual basis for a claim that it owns Mr. Potter's Book of Business").)

As Nationwide explained during the hearing before the district court, "the Plaintiff in [*Potter*] actually asserted that you're making me buy what I already own. I already own these policies. *That is not being asserted in this lawsuit*. There's no challenge to Nationwide's ownership of what it is – had offered to sell and is going to transfer.... So that issue is not even here, Your Honor…." (Transcript of Proceeding 53:3-11 (APPX A-149) (emphasis added).) The district court agreed. (*Id.* at 53:22-24 (APPX A-149) ("Like I said, [] to me, it ultimately does not matter and *I, too, did not think that there was an argument about that*.") (emphasis added).)

To the extent ownership of policy assets was briefly discussed below, it was never properly put at issue. Appellants first challenged ownership at oral argument in a final effort to save their claims. But arguments made for the first time at oral argument are waived. *See Halpert Enter., Inc. v. Harrison*, No. 07-1144-CV, 2008 WL 4585466, at *3, n.1 (2d Cir. Oct. 15, 2008) ("[G]iven [the appellant's] failure to mention this argument in either its complaint or its memorandum, raising such claim even explicitly at oral argument would have been to no avail."); *Harris v. Wu-Tang Prods., Inc.*, No. 05 CIV. 3157(WHP), 2006 WL 1677127, at *3 (S.D.N.Y. June 16, 2006) ("This Court need not consider an argument raised for the first time at oral argument.") (citing *United States v. Barnes*, 158 F.3d 662, 672 (2d Cir. 1998)).

As noted below, Nationwide did not fully brief ownership before the district court because Appellants had not asserted any claims about ownership in their Complaint. (Transcript of Proceeding 53:5-8 (APPX A-149).) Had Appellants made those claims before oral argument, Nationwide would have defended itself accordingly. (*See id.* at 53:17-20 (APPX A-149) ("There's a number of other cases we can cite. We just didn't cite it because it's not an issue in the case, but I think there's about five or six cases which support that proposition.").)[8]

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[8] Nationwide made limited references to ownership in its letter briefing to provide context for the ACE Program (the transferring of policy assets for purchase or not) and to explain that the purpose behind paragraph 11(f) of the Agency Agreement is to protect Nationwide's property in the policy assets. (Nationwide's Ltr. Reply in Support of Motion to Dismiss, 3 (APPX A-63).) Nationwide cited a handful of cases to support its position that 11(f) is a reasonable provision to protect its property. *Id.* (citing *John Hancock Mut. Life Ins. Co. v. Austin*, 916 F. Supp. 158, 164–65 (N.D.N.Y. 1996); *Forbes v. Nationwide Mut. Ins. Co.*, No. 14-CV-4944, at 26–28 (Ohio Ct. C.P. Apr. 27, 2017); *Kohler v.*

Moreover, Appellants cannot argue they will suffer injustice if this Court declines to consider Appellants' new arguments because resolving the ownership question is not necessary to the claims stated in their Complaint. *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d at 132–33.

C. In Any Event, Ownership Is Clear.

Despite ownership not being at issue in this case, Nationwide does own the policy assets serviced by exclusive agents, including Appellants. Even on a limited record, ownership is clear. For example, Appellants complain about the "set of restrictive covenants" that accompany the various ACE Options. (Compl. ¶30 (APPX A-15).) But, they fail to mention that each restrictive covenant makes clear that Nationwide owns the policy assets. (*See, e.g.*, Compl., Ex. B (APPX A-40) ("No Sale" refers to "Nationwide policy expirations, renewal rights, and customer data"; "Last-look" refers to Nationwide purchasing "Nationwide policies"; "Permanent buy-back" allows Nationwide to "re-purchase remaining original Nationwide policies.").) Exhibit C to Appellants' Complaint further emphasizes that Nationwide retains ownership of its policies. It shows at least an

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Nationwide Mut. Ins. Co., 152 F.3d 926, 1998 WL 385133, at *2 (9th Cir. June 22, 1998)). Nationwide's citation of these cases did not put ownership at issue—they served only to provide context to the forfeiture provision and Nationwide's motivations for enforcing its contractual rights. *Id.*

initial election by Appellants to pursue Option 1 of the ACE Program, which refers to "Nationwide policies my agency currently services." (APPX A-43.)[9]

Appellants claim there are "multiple judicial decisions against Nationwide" indicating that Nationwide does not own its own policyholder information, even though everything an exclusive agent does is as an agent for the insurance company. Despite declaring "multiple decisions," Plaintiffs discuss only one, *Nationwide Mut. Ins. Co. v. Fleming*, No. 99-1417, 2001 U.S. Dist. LEXIS 26739 (W.D. Pa. Oct. 2, 2001). But before *Fleming* and uniformly after *Fleming*, courts have regularly held that Nationwide owns its own insurance contracts and the policyholder information in those contracts. *See Kohler v. Nationwide Mut. Ins. Co.*, 152 F.3d 926, 928 (9th Cir. June 22, 1998) (unpublished table decision) (holding plaintiffs failed to show "ownership or right to possession of the book of business"); *Garbinski v. Nationwide Mut. Ins. Co.*, No. 3:10-cv-1191, 2012 WL 3027918, at *3 (D. Conn. July 24, 2012) ("Nationwide retained ownership of its policies, with [the agent] having the servicing rights to those policies."), *aff'd*, 523 F. App'x 24 (2d Cir. 2013) (summary order); *Bye v. Nationwide Mut. Ins. Co.*, No. 08-10824, 2011 WL 1135453, at *7 (E.D. Mich. Mar. 25, 2011) (finding "[no]

[9] The language in Exhibit C also negates Appellants' contention that the Agency Agreement is a "fully-integrated" contract. (Opening Br. at 19, 26, 30.) Exhibit C acknowledges "amendments" to Nationwide agency agreements. (APPX A-43.) Those amendments, while not before the district court in this case, explicitly state that Nationwide retains ownership of the policy assets.

question that Nationwide, at all times, owned [the agent's] book of business"); *Forbes v. Nationwide Mut. Ins. Co.*, No. 14-CV-4944, at 26, 28 (Ohio Ct. C.P. Mar. 13, 2019) (Ex. to July 11 2019 Ltr., Doc. 33-1 (APPX A-64–A-96)); *Fox v. Nationwide Mut. Ins. Co.*, 117 N.E.3d 121, 144 (Ohio Ct. App. 2018) ("There is no dispute that the written [contract] expressly provides that Nationwide retains ownership of the policies sold by [the agent]...."); *Theiss v. Nationwide Mut. Ins. Co.*, No. 15-CV-4652 (Ohio Ct. C.P. Sept. 19, 2016) ("Likewise, based on the parties' agreements, there is no doubt that Nationwide retained ownership of the book of business throughout [the agent's] agency."); *Costanzo v. Nationwide Mut. Ins. Co.*, 832 N.E.2d 71, 78 (Ohio Ct. App. 2005) (affirming finding that contract "identified Nationwide as the owner of the policyholder information").

Even though irrelevant, and on the limited record, the district court correctly determined that ownership was clear. (*See, e.g.*, Transcript of Proceeding 31:21-25 (APPX A-127) ("[Mr. DeVivo] does not own the policies under the exclusive agency agreement, rather Nationwide has retained ownership, but he is given the right to assist and maintain those policies and that is the agreement."); *id.* at 30:11-16 (APPX A-126) ("The value of the policies he also gets. And so why is that not part of the equation?"); *id.* at 29:10-14 (APPX A-125) ("Option 1 is the agency buys the Nationwide policies it has in full[.]").)

Finally, even if Appellants are correct and Nationwide does not own anything that Nationwide is offering to transfer to its exclusive agents, it begs the question—so what? If Appellants really believe that, they do not have to elect either of the two ACE Options that remain available to them. If they truly believed that back in April 2018, they could have cancelled their Agency Agreement and cashed in their Extended Earnings before August 1, 2019. Or they can still wait for Nationwide to cancel their exclusive agreement in July 2020. At that point, they can choose to compete against Nationwide and forfeit their credited DCIC.

In short, Appellants' contention that Nationwide does not own the policy assets serviced by Appellants is false, irrelevant, and need not be considered by this Court.

CONCLUSION

For the reasons set forth above, the district court's dismissal of Counts I, II, and III with prejudice should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2019, I electronically filed the foregoing brief with the Clerk of Court of the United States Court of Appeals for the Second Circuit and served upon the following counsel of record using the CM/ECF system:

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I further certify that six paper copies of this brief have been filed with the Court pursuant to Local Rule 31.1.

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