

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

NORTHPOINTE HOLDINGS, LLC,)	
Plaintiff/Counter-Defendant,)	
v.)	
)	
NATIONWIDE EMERGING)	C.A. No. N09C-11-141 ALR
MANAGERS, LLC,)	
Defendant/Counter-Plaintiff/)	
Third-Party Plaintiff,)	
and)	
)	
NATIONWIDE CORPORATION, and)	
NATIONWIDE MUTUAL INSURANCE CO.,)	
Defendants,)	
v.)	
)	
NORTHPOINTE CAPITAL, LLC,)	
PETER CAHILL, MARY CHAMPAGNE,)	
ROBERT GLISE, MICHAEL HAYDEN,)	
JEFFREY PETHERICK, STEPHEN)	
ROBERTS, and CARL WILK,)	
Third-Party Defendants.)	

Submitted: July 22, 2015
Decided: August 17, 2015

DECISION ON REMAND

Bartholomew J. Dalton, Esquire, Dalton & Associates, P.A., Wilmington, DE, and Rodger D. Young, Esquire, Jaye Quadrozzi, Esquire, Young & Associates, Farmington Hills, MI, Attorneys for NorthPointe Holdings, LLC, NorthPointe Capital, LLC, Peter Cahill, Mary Champagne, Robert Glise, Michael Hayden, Jeffrey Petherick, Stephen Roberts and Carl Wilk.

Colm F. Connolly, Esquire, Morgan, Lewis & Bockius LLP, Wilmington, DE, and Jay H. Calvert Jr., Esquire, Bahar Shariati, Esquire, Jessica A. Stow, Esquire, Morgan, Lewis & Bockius LLP, Philadelphia, PA, Attorneys for Nationwide Emerging Managers, LLC, Nationwide Corporation, and Nationwide Mutual Insurance Company.

Rocanelli, J.

This is the decision of the Court on remand from the Delaware Supreme Court which directed that “[o]n remand, the Superior Court should determine whether NorthPointe is entitled to Termination Fees, capped at \$3.5 million, for terminating NorthPointe as sub-advisor of six funds, including the NorthPointe NVIT, within three years of closing, or whether Nationwide can invoke the Cause or Fiduciary Exception.”¹ Nationwide contends that it properly invoked the Cause Exception when terminating its business relationship with NorthPointe. Nationwide does not argue that the Fiduciary Exception applied. NorthPointe contends that the Cause Exception was not invoked by Nationwide.

This matter was presented as a bench trial and, as such, this judge was the trier of fact. The Court heard the testimony of nineteen witnesses and considered scores of documents and demonstrative exhibits. On appeal, the Delaware Supreme Court rejected this Court’s legal conclusions in reversing the decision after trial. In this decision on remand, this Court now applies the higher Court’s legal rulings to this Court’s factual findings based on its assessment of the evidence and consideration of the credibility of the witnesses.

¹ *Nationwide Emerging Managers, LLC v. NorthPointe Holdings, LLC*, 112 A.3d 878, 899 (Del. 2015).

1. The Record Evidence Does Not Support a Finding that Nationwide Terminated NorthPointe for Cause

Based on the record evidence presented at trial, Nationwide did not terminate NorthPointe for cause pursuant to the Purchase Agreement. Rather, the record evidence supports a finding that Nationwide made a decision to terminate its relationship with NorthPointe for business reasons. The Purchase Agreement allowed for such termination.²

At trial, Nationwide offered several witnesses who testified regarding Nationwide's changing business models and strategies for asset management. Paul Hondros was president of Nationwide Fund Advisors ("NFA") when NorthPointe was first approached to buy-out Nationwide's ownership interest in managing the six funds. In May 2007, Hondros left his position as president of NFA, and was replaced by John H. Grady. In January 2008, Stephen Timothy Grugeon replaced Grady and Grugeon acted as president of NFA on an interim basis. Subsequently, Michael P. Spangler became president of NFA on June 30, 2008. Thomas Hickey

² *Id.* at 896 (explaining the termination provisions of the Purchase Agreement). Nationwide's termination of NorthPointe was an efficient breach of the Purchase Agreement. Efficient breach is "[a]n intentional breach of contract and payment of damages by a party who would incur greater economic loss by performing under the contract." Black's Law Dictionary 183 (7th ed. 2001). The principles of efficient breach contemplate economic efficiency by "giving the other party an incentive to break the contract if, but only if, he gains enough from the breach that he can compensate the injured party for his losses and still retain some of the benefits from the breach." *Restatement (Second) of Contracts*, ch. 16, reporter's note, intro. note (1981). Indeed, Delaware law recognizes the principles of efficient breach. *Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 453 n.39 (Del. 2013) ("Where a party effectively breaches a contract, the typical measure of damages is a non-breaching party's 'expectation' [damages].") (internal citation omitted); *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 445-46 (Del. 1996); *NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *30 (Del. Ch. Nov. 17, 2014).

was presented at trial as the Nationwide employee with direct responsibility for Nationwide's relationship with NorthPointe from early 2008.³ In addition to these Nationwide employees, David Wetmore, Chairman of the Board of Trustees of Nationwide Mutual Funds ("Board") since 2005, testified as a witness.

Except for Grady, the Nationwide witnesses testified that they made business decisions regarding NorthPointe without regard to Nationwide's contractual obligations to NorthPointe under the Purchase Agreement.⁴ Indeed, most witnesses claimed to have never read the Purchase Agreement. For example, Wetmore and Grugeon denied any concern for Nationwide's contractual obligations to NorthPointe. Likewise, Grugeon himself conceded that he did not know the details of the Purchase Agreement. Nonetheless Grugeon testified that Nationwide made a business decision to return to a direct management of funds rather than the sub-advised model. Grugeon also testified that he told the Board not to consider the Purchase Agreement in effectuating Nationwide's change in business strategy. Wetmore admitted that he never reviewed the Performance Standards set forth in the Purchase Agreement because the Board had "zero concern" about whether its decisions would cost Nationwide money. Notably, Hickey testified at trial that, despite his oversight responsibilities, he had no

³ There were significant inconsistencies between Hickey's deposition testimony and his trial testimony. For example, at his deposition, Hickey accepted responsibility from mid-2007 but, at trial, Hickey stated his responsibility for the NorthPointe funds began sometime in early 2008.

⁴See *NorthPointe Holdings, LLC v. Nationwide Emerging Managers, LLC*, 2014 WL 3611669, at *15 (Del. Super. July 16, 2014) (discussing witness testimony).

information about the Purchase Agreement, including no information about the exhibits or schedules setting forth Performance Standards.

Accordingly, based on the presentation of the Nationwide witnesses at trial, Nationwide did not establish that its decision to terminate NorthPointe was based on the Performance Standards set forth in the Purchase Agreement. Rather, the Nationwide witnesses testified that the contract provisions set forth in the Purchase Agreement were not consulted in the decision-making process. Thus, Nationwide did not prove that the Cause Exception applied. Because the Cause Exception does not apply, Nationwide owes Termination Fees to NorthPointe.

2. In the Alternative, the Cause Exception Does Not Apply Because NorthPointe Was Not in Violation of the Performance Standards

Because the Court concludes that Nationwide did not rely upon the Cause Exception in terminating NorthPointe, it is not necessary to address whether the Cause Exception was applicable. Nevertheless, the Court finds, in the alternative, based on the record evidence presented at trial, that NorthPointe was not in violation of the Performance Standards set forth in the Purchase Agreement. There are two issues: (i) whether the Performance Period started at the date of Closing (prospective) or started before the date of Closing (retroactive); and (ii) whether Performance is measured by annualizing performance over a single three-year period or measured by performance in each of three consecutive one-year periods.

With respect to the first issue, Nationwide urges this Court to rule that the Performance Standards applied retroactively and that NorthPointe already had deficient performance prior to the date of the Closing. However, the record evidence of Nationwide's contemporaneous representations to its Board and shareholders does not support Nationwide's litigation position that NorthPointe's performance was already deficient at the time of Closing. The Purchase Agreement was signed on July 19, 2007 and the Closing Date was September 28, 2007. In December 2007, Nationwide made a presentation to its shareholders applauding the performance and stature of NorthPointe as a high quality investment advisor that was unaffiliated with Nationwide.⁵ Accordingly, the Court rejects Nationwide's litigation position that NorthPointe was already underperforming at the time of Closing as inconsistent with Nationwide's own representations to its Board and shareholders.⁶ Therefore, even if the Performance Period is measured from a date before the time of Closing (retroactively, as Nationwide claims), the Cause Exception does not apply because the record evidence demonstrates that Nationwide was satisfied with NorthPointe's performance at the time of Closing.

With respect to the second issue, the Performance Period must be measured by reviewing NorthPointe's performance over three one-year periods. The Court

⁵ *Id.* at *7.

⁶ *Id.* at *11–12.

assigns the plain meaning to the Purchase Agreement’s words in Schedule 2 to Exhibit D.⁷ “Three consecutive years” means three years in a row. Nationwide’s litigation position is contrary to the plain language of the Purchase Agreement and is not supported by the record evidence. According to Nationwide, NorthPointe’s performance should be analyzed by selecting a single 36-month time period, computing the annual performance for each 12-month period within the 36-month time period, and then averaging or annualizing those numbers into a single number. Nationwide concedes that it can only prevail on this issue if the Court agrees that the Performance Standards allow for annualized performance, rather than a review of performance for each year, three years in a row. It is noteworthy that Nationwide does not point to any record evidence in support of its analysis, because that evidence is lacking. Moreover, the Court finds that Nationwide’s suggested analysis is not consistent with the plain meaning of the terms set forth in Purchase Agreement.

The Performance Standards are set forth in Exhibit D to the Purchase Agreement which does not include *any* reference to annualized performance. Rather, the Purchase Agreement requires that each consecutive year must be

⁷ See *Nationwide Emerging Managers, LLC*, 112 A.3d at 890–92. See also *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012).

separately analyzed. The Court accepts the testimony of Robert Cahill⁸ that, first, NorthPointe's performance must be analyzed for each of the three years; and, second, for each separate year, NorthPointe's performance must have been in the bottom third of comparable funds' performance; and, finally, NorthPointe's performance must not have met the Performance Standards for each of the three years in a row. Thus, the Court finds, with respect to the second issue, that NorthPointe could only be terminated for cause if NorthPointe's performance failed to meet Performance Standards in each year, three years in a row. When NorthPointe's performance is measured in this manner, the Performance Standards were met.⁹

3. There is No Dispute Regarding the Calculation of the Termination Fees

Although there is a dispute between the parties regarding whether or not Termination Fees are owed to NorthPointe, the parties are in agreement as to the calculation of the aggregate amount of Termination Fees if the Court rules such Fees are owed. According to both Nationwide and NorthPointe, the aggregate Termination Fees are \$1,388,920.00.¹⁰ The parties also agree that applying the

⁸ Robert Cahill is one of seven individuals with an ownership interest in NorthPointe Holdings, LLC, and is a named third-party defendant.

⁹ *NorthPointe Holdings, LLC*, 2014 WL 3611669, at *11 (finding that NorthPointe met the Performance Standards specified in the Purchase Agreement).

¹⁰ The parties do not address pre-judgment interest. The Delaware Supreme Court stated in its decision remanding the action to this Court, "[t]he Purchase Agreement contemplated that Nationwide could invoke the Fiduciary or Cause Exception, and if Nationwide failed to prove

Termination Fees as an offset to the amount owing on the Note as of August 31, 2015, results in a net amount owing on the Note of \$16,456,855.59.

NOW, THEREFORE, JUDGMENT SHALL ENTER in favor of NorthPointe Holdings, LLC, NorthPointe Capital, LLC, Peter Cahill, Mary Champagne, Robert Glise, Michael Hayden, Jeffrey Petherick, Stephen Roberts and Carl Wilk and against Nationwide Emerging Managers, LLC and Nationwide Corporation and Nationwide Mutual Insurance Company in the amount of \$1,388,920.00.

IT IS SO ORDERED this 17th day of August, 2015.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli

that the exception applied in any litigation between the parties, pre-judgment interest would compensate NorthPointe for the delay, as is ordinary in litigation.” *Nationwide Emerging Managers, LLC*, 112 A.3d at 897.