IN THE SUPREME COURT OF THE STATE OF DELAWARE

INVICTUS GLOBAL MANAGEMENT, LLC, INVICTUS SPECIAL SITUATIONS I GP, LLC, CINDY CHEN DELANO, and AMIT PATEL,	)	No. 283, 2025
Defendants-Counterclaim Plaintiffs Below, Appellants,	)	
v.	)	On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2023-1099-NAC
INVICTUS SPECIAL SITUATIONS MASTER I, L.P.,	)	
Plaintiff-Counterclaim Defendant Below, Appellee,	)	

APPELLANTS' OPENING BRIEF

Todd C. Schiltz (#3253)
Oderah C. Nwaeze (#5697)
Renée M. Dudek (#6623)
FAEGRE DRINKER
BIDDLE & REATH LLP
222 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801
(302) 467-4200
todd.schiltz@faegredrinker.com
oderah.nwaeze@faegredrinker.com
renee.dudek@faegredrinker.com

Counsel for Defendant-Counterclaim Plaintiff, Appellant Cindy Chen Delano

Rudolf Koch (#4947)
Robert L. Burns (#5314)
Susan Hannigan Cohen (#5342)
Nicole M. Henry (#6550)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700
koch@rlf.com
burns@rlf.com
scohen@rlf.com
henry@rlf.com

Counsel for Defendants-Counterclaim Plaintiffs, Appellants Invictus Global Management, LLC, Invictus Special Situations I GP, LLC, and Amit Patel

Dated: September 30, 2025

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NATURE OF THE PROCEEDINGS

This is a case about whether the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), prohibits advancement for the defense of state-law claims brought in a state court. It does not. The Court of Chancery's contrary, and unprecedented, decision must be reversed.

ERISA § 410, the section at issue here, voids contractual provisions that "purport[] to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty" under ERISA. 29 U.S.C. § 1110(a). The Court of Chancery interpreted that provision to void any agreement that provides for advancement of an ERISA fiduciary's defense costs from an ERISA-governed fund. That ruling was plainly incorrect. Fronting defense costs in this suit, brought by Plaintiff-Appellee Invictus Special Situations Master I, L.P. (the "Fund"), would not relieve Defendants-Appellees ("Defendants") of any responsibility or liability under ERISA, as the Fund did not sue Defendants in the Court of Chancery for breaches of ERISA fiduciary duties. Indeed, it could not have, because the federal courts have exclusive jurisdiction over such claims. And the Fund has made multiple representations to the federal court that its claims are wholly unrelated to ERISA to keep these very claims out of federal court. Providing advancement here, therefore, cannot relieve Defendants from responsibility or liability for any ERISA fiduciary duties.

Without any basis to apply ERISA § 410, the Court of Chancery voided Defendants' contractual advancement rights anyway. It applied dicta from an unpublished Third Circuit decision, *Secretary United States Department of Labor v. Koresko*, 646 F. App'x 230 (3d. Cir. 2016), to hold that ERISA categorically forbids advancement to ERISA fiduciaries from ERISA plan assets. But *Koresko* did not so hold, and that decision is immaterial here. The *Koresko* court applied the plain language of ERISA § 410 to void a facially invalid agreement that purported to require ERISA plans to indemnify ERISA fiduciaries from liability for ERISA fiduciary misconduct. This is not at all the case here. Extending *Koresko*'s non-precedential (and factually distinguishable) holding to forbid advancement for the defense of state-law claims runs directly contrary to not only the express language of § 410, but also to federal case law, guidance from the Department of Labor, ERISA's purposes, and Delaware's own policies strongly favoring advancement.

ERISA has nothing to say about state-law advancement for state-law claims. Because the Court of Chancery held otherwise—and appears to be the first court ever to bar contractual advancement for the defense of state-law claims Congress did not intend ERISA § 410 to reach—its judgment should be reversed.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred when it held that ERISA § 410 bars advancement to Defendants for the defense of non-ERISA claims. Section 410 bars only agreements that purport to relieve an ERISA fiduciary of liability or responsibility for ERISA fiduciary duties. Advancement thus is appropriate here for at least three reasons.

2. First, the advancement Defendants seek cannot relieve them of responsibility or liability for ERISA fiduciary duties because none are at issue. This case features only state-law claims, and the Fund cannot impose ERISA fiduciary liability or responsibility through those non-ERISA claims, much less through an affirmative defense.

3. Second, the advancement to which Defendants are contractually entitled is subject to repayment. It therefore does not exculpate them from any liability or responsibility and thus does not come within the ambit of ERISA § 410 at all.

4. Third, construing ERISA § 410 to permit the parties' advancement agreement here is consistent with decades of case law confirming that ERISA does not bar all advancement from ERISA plan assets. It is also consistent with the settled approach of the Department of Labor (the "DOL"), the agency charged with

enforcing ERISA, which has likewise recognized that advancement provisions like the provision here are not prohibited by ERISA § 410.

5. The Court of Chancery's contrary determination cannot withstand scrutiny. That court's categorical holding that ERISA bars all advancement from ERISA plan assets finds no support in *Koresko*, the authority on which the Court of Chancery relied almost exclusively. And although the Court of Chancery also invoked the purposes of ERISA, those purposes—along with the public policy of Delaware—in fact undermine the Court of Chancery's reasoning.

STATEMENT OF FACTS

A. Invictus's Founding and Early Success

In 2019, defendants Cindy Chen Delano and Amit Patel (together, "Invictus Founders") co-founded Invictus Global Management, LLC ("IGM") and Invictus Special Situations I GP ("Invictus GP," and, together with IGM, "Invictus"). Defendants' Answer and Counterclaims (A00640 ¶2). Invictus was one of the first and only minority- and woman-led and founded investment firms in the asset management industry.

In 2020, Invictus initiated the Fund, which was its inaugural investment fund. The Fund focused on niche, non-correlated litigation-oriented special situations spanning the distressed debt, bankruptcy, and litigation finance sectors. Fund's Verified Complaint (A00185 ¶¶20-21); Pre-trial Order (A00754 ¶8). The Fund's strategy was to capitalize on the Invictus Founders' substantial value-investing experience and deep knowledge and expertise in bankruptcy, restructuring, and litigation and to source investment opportunities through their long-established networks.

The Fund is made up of two feeder funds through which individual investors indirectly invest in the Fund: Invictus Special Situations Domestic I, L.P. ("Domestic Feeder"), and Invictus Special Situations Offshore I, L.P. ("Cayman Feeder"). Pre-trial Order (A00754 ¶8). The Cayman Feeder holds some assets governed by ERISA.

Chen Delano Affidavit (A00823 ¶¶7-8). The Domestic Feeder has no such assets. *Id.*

Under the Invictus Founders' leadership, the Fund generated significant, above-market returns for the benefit of its investors quarter after quarter, and the Fund was on track to solidify top-decile investment returns. Chen Delano Affidavit (A01093 ¶8); Defendants' Answer and Counterclaims (A00640 ¶2).

Invictus GP and IGM served as the Fund's general partner and investment manager, respectively, from the time of the Fund's founding until September 29, 2023, when the Fund's controlling limited partners removed them on a "no-fault" basis. Resolution of Fund Investors (A00174). In their place, the Fund installed TREO Vitus GP, LLC and TREO Asset Management LLC, as the Fund's new general partner and investment manager, respectively. Fund's Verified Complaint (A00186 ¶29).

B. The Fund's Indemnification and Advancement Obligations

The Fund's organizational documents include an Amended and Restated Partnership Agreement ("LPA") and an Investment Management Agreement ("IMA"). LPA (A00104); IMA (A00169). Both provide certain rights of indemnification, exculpation, and advancement of reasonable attorneys' fees and expenses.

Section 3.03(b) of the LPA requires that the Fund "indemnify and hold harmless" any "Indemnified Person" from and against "any damages, costs, losses, claims, liabilities, actions, and expenses, including reasonable legal and other professional fees and disbursements and all expenses reasonably incurred investigating, preparing, or defending against any claim whatsoever, judgment, fines, and settlements" incurred by such person "arising out of or related to this Agreement." (A00116 §3.03(b)). "Indemnified Person" is defined to include the Fund's "General Partner" and "Management Company," as well as "their respective employees, officers, directors, and representatives." (A00160).

Section 3.03(e) of the LPA provides:

> Expenses reasonably incurred by a[n] Indemnified Person in defense or settlement of any claim that may be subject to a right of indemnification hereunder shall be advanced by the Partnership prior to the final disposition thereof upon the receipt of a written undertaking by or on behalf of such Indemnified Person to repay such amounts to the extent that it is ultimately determined that such Indemnified Person is not entitled to be indemnified hereunder.

(A00117 §3.03(e)).

The IMA buttresses the indemnification and fee advancement rights in the LPA. It provides indemnification and advancement rights to "the Management Company and its Affiliates, officers, directors, agents, stockholders, members, employees and partners . . . to the same extent as other 'Indemnified Persons' as provided in the Fund Agreements[.]" (A00170-71 §§6(i) & (ii)).

C. The Fund Files Suit Against the Invictus Founders

On October 30, 2023, the Fund filed this action in the Delaware Court of Chancery, in its own name, against Defendants. (A00177). The Fund accused Defendants of breaching the LPA and the IMA and sought various forms of equitable relief, including specific performance, reformation, an accounting, injunctive relief, imposition of a constructive trust, and damages. *See generally id.* ¶¶100-78. The Fund brought its claims under Delaware and Cayman law and asserted that the Court of Chancery had jurisdiction over them under 10 *Del. C.* § 341. *See id.* & ¶17. The Fund's complaint made no mention of ERISA.

Three days later, Defendants demanded indemnification and advancement from the Fund. Glenn Agre Letter to Fund (A00553). On November 17, 2023, Defendants filed their counterclaims for advancement and fees-on-fees against the Fund and its affiliate UnumX for this and other litigation. *See generally* Defendants' Answer and Counterclaims (A00573).

The Fund disputed Defendants' advancement counterclaims in its December 7, 2023 answer and asserted affirmative defenses. *See* Answer to Counterclaims and Third-Party Complaint (A00667). Among the Fund's four affirmative defenses was the contention that the counterclaims were barred, "in whole or in part, by Defendants' prior material breach(es) of contract, breaches of fiduciary duty, breaches of the Investment Advisers Act of 1940, and breaches of ERISA." *Id.* at 36-37.

Once it appeared that the Fund intended to rely on ERISA to advance its claims and defenses, Defendants removed the action to federal court on January 6, 2024. *See* Notice of Removal (A00713 ¶6). Defendants explained that the Fund was "effectively asserting a theory of liability (not alleged in the Complaint) that [Defendants were] ERISA fiduciaries who purportedly breached their fiduciary duties to the Fund." *Id*. ¶7. And as Congress has vested jurisdiction to hear claims for ERISA fiduciary breaches exclusively in federal district courts, any litigation of the Fund's claims had to proceed, if at all, in federal court. *See id.* ¶¶7-11.

The Fund immediately sought remand. It insisted that its claims in this action "***do not arise under federal law and could not have been brought in federal court***." Fund Motion to Remand (A00726) (emphasis added); *see also id.* (A00740) ("Each of these claims arises under Delaware or Cayman law, depending on the specific agreements at issue. None of these claims arises under ERISA or other federal law."). It conceded that if it were to pursue ERISA claims against Defendants, it would have to do so in federal court. *Id.* (A00741).

Accepting the Fund's representations that it was pursuing claims that "relate to different duties than ERISA," the District Court remanded the proceedings back to the Court of Chancery. Remand Decision (A00749). But it cautioned that any claim the Fund sought to raise "under ERISA at a later point in time" would have to be heard in federal court because "the Court of Chancery would not have jurisdiction over such a cause of action." *Id.* (A00749 n.1).

On May 6, 2024, Chen Delano filed a motion for partial summary judgment on Counts I and II of her Counterclaims for advancement and fees-on-fees. Chen Delano Motion for Summary Judgment (A00814). On September 9, 2024, the Court of Chancery granted Chen Delano summary judgment on her advancement counterclaims. Bench Ruling Tr. (A00944). It observed that the LPA "provide[s] for mandatory advancement" and noted that "'Delaware policy favors indemnification and advancement'" and that "'[a]ny doubts should be resolved in favor of advancement.'" *Id.* (A00949:6-17) (citations omitted).

The Court of Chancery did not address the Fund's so-called ERISA defense, however, because "no one . . . satisfactorily articulate[d] why this Court should or even can address the contours of ERISA." *Id.* (A00979:1-19). And the court declined to revisit that aspect of its ruling on the Fund's subsequent motion for reargument. *See* Reargument Order (A01034); *see also* Fund Motion for Reargument (A00990-A00993). On November 18 and November 20, 2024, over the Fund's objections, the Court of Chancery entered Orders implementing its advancement ruling and obligating the Fund to fulfill its advancement obligations towards each of the

Defendants (the "Implementing Orders"). *See* Implementing Orders (A01038), (A01050).

D. The Fund Invokes ERISA to Avoid Advancement

On November 20, 2024, the Fund took the parties back to federal court with a new complaint and motion for emergency injunctive relief. *See* Fund District of Delaware Complaint (A01065). On December 17, 2024, over Defendants' objections, the Court of Chancery stayed the Fund's obligations to make payments under the Implementing Orders. Order to Stay Advancement (A01089).

This time in federal court, the Fund claimed, rather than disclaimed, federal jurisdiction. But it reiterated the same position that had earlier earned it remand—that "ERISA was not implicated in [its] affirmative claims in its complaint." Fund District of Delaware Complaint (A01074 ¶45); *see also id.* (A01076 ¶50). During oral argument before the District Court, the Fund admitted that it *could have* commenced a federal action at the outset of this dispute, in which case, the federal courts *would have had* jurisdiction over the dispute. TRO Hearing Tr. (A01110:22- A01111:1). It also conceded that the federal courts have *exclusive* jurisdiction over any ERISA claims the Fund might have in connection with the parties' dispute. *Id.* (A01139:3-10). But it insisted that it "didn't bring" such a suit. *Id.* (A01139:3-8). In reliance on those representations, the District Court doubted it had subject matter jurisdiction over the Fund's action, denied the Fund's motion for emergency relief, and encouraged the Fund to dismiss its federal suit, which it subsequently did. *Id.* (A01146:21-A01147:17); *see also id.* (A01112:25-A01113:5).

Upon returning to the Court of Chancery, Defendants moved to enforce the court's earlier judgments awarding them advancement. *See* Defendants' Motion for Enforcement of Judgment (A01149); Opening Brief for Defendants' Motion for Enforcement (A01157). In response, the Fund filed a second motion for partial summary judgment on its so-called ERISA defense. Fund Motion for Partial Summary Judgment (A01194). For the first time in this action, the Fund recharacterized the LPA and IMA as "ERISA plan documents," its contract claims as claims for breaches of *ERISA duties*, and the Court of Chancery's earlier orders as having established ERISA fiduciary breaches. Fund Reply Brief in support of Motion for Partial Summary Judgment (A01913-14).

On May 23, 2025, the Court of Chancery denied Defendants' motion for enforcement, vacated the Implementing Orders in part (effectively reversing itself on the issue of Defendants' entitlement to advancement), and awarded summary judgment to the Fund on its so-called ERISA defense to advancement ("ERISA Ruling"). ERISA Ruling Tr. (A02147). The court expressed "skepti[cism] about whether [it] ha[d] subject matter jurisdiction over the question presented[.]" *Id.* (A02151). But it nonetheless proceeded to decide the merits of the Fund's defense because it believed it was required to do so by the federal District Court's decision and because it was "not in a position to say that the District Court clearly got it wrong." *Id.* (A02151-A02152); *see also* Order Certifying Interlocutory Appeal (A02192 ¶15).

On the merits, the Court of Chancery held that, under *Koresko*, ERISA § 410 prohibits any contractual provision that allows a fund to "advance funds to an ERISA fiduciary using plan assets." ERISA Ruling Tr. (A02159-A02164); *see id.* (A02167) ("*Koresko* simply says that agreements to front defense costs of ERISA fiduciaries from ERISA fund assets are void.").

Defendants timely applied for interlocutory appeal. Application for Interlocutory Appeal (A02171). And on June 30, 2025, the Court of Chancery certified the interlocutory appeal for several reasons. Order Certifying Interlocutory Appeal (A02187). On August 13, 2025, this Court accepted Defendants' application for interlocutory review. Order Granting Interlocutory Appeal (A02203).

ARGUMENT

I. ERISA § 410 DOES NOT BAR ADVANCEMENT HERE.

A. Question Presented

Did the Court of Chancery err in holding that ERISA § 410 **voids** Defendants' contractual **right to** advancement for expenses incurred defending non-ERISA claims in state court on the sole basis that the expenses would be paid from a fund that held ERISA plan assets? (A01178). *See also* (A001157-1963).

B. Scope of Review

The Court reviews de novo the trial court's ruling on a motion for summary judgment. *ACE Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239, 244 (Del. 2022). Questions of statutory interpretation also are reviewed de novo. *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 427 (Del. 2010).

C. Merits of the Argument

Defendants have located, and the Fund has cited, no decision of any court in the country that has applied ERISA § 410 to bar advancement for expenses incurred defending claims arising under state law. That is because it does not.

ERISA § 410 is concerned only with agreements that purport to relieve an ERISA fiduciary of liability or responsibility for ERISA fiduciary duties. The parties' advancement agreement does not. Applied here, advancement could not exculpate Defendants from ERISA fiduciary liability or responsibility because the

Fund's claims arise under state law and do not concern ERISA fiduciary duties. Moreover, advancement itself is not exculpatory and under the contracts here must be repaid if a court ultimately determines that Defendants were not entitled to indemnification because, for example, they engaged in disabling conduct. Consequently, ERISA § 410 is inapplicable. The Court of Chancery's broader reading of that statute to prohibit all advancement to ERISA fiduciaries from ERISA-governed assets is inconsistent with the statute's plain text, federal precedent, DOL guidance, and underlying policy considerations.

The Court of Chancery's ERISA Ruling should be reversed, and Defendants awarded advancement.

1. ERISA § 410(a) does not void a contractual advancement obligation where the plaintiff does not raise ERISA claims.

a. ERISA is inapplicable to matters not involving or touching upon ERISA.

ERISA is a federal statute that governs private employee benefits. *See, e.g.*, *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002). The statute is "comprehensive and reticulated[.]" *Id.* (citation omitted).

And because it is so carefully reticulated, the U.S. Supreme Court has "been especially reluctant to tamper with" it, as the statute's detail "provides strong evidence" that Congress intentionally delimited the statute's reach. *Id.* (citations and quotations omitted); *see also, e.g.*, *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) ("We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA"); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) ("In a comprehensive regulatory scheme like ERISA, such omissions are significant ones.").

As relevant here, ERISA regulates certain pension funds and imposes certain fiduciary duties on investment managers appointed by a plan sponsor. *See* 29 U.S.C. §§ 1002(1), (38). Section 502 of ERISA specifies the "exclusive" causes of action available to enforce ERISA and who may use them. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *see* 29 U.S.C. § 1132(a); *see also, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004). And it gives federal courts "exclusive" jurisdiction over those enforcement mechanisms, save for one not relevant to this dispute, over which federal and state courts have concurrent jurisdiction. 29 U.S.C. § 1132(e)(1). So, if a claim pleaded under state law could have been brought under ERISA and relates to ERISA duties, ERISA trumps, and the state-law claim is preempted. *See Davila*, 542 U.S. at 209. ERISA also preempts state laws that have an impermissible "connection with or reference to" an ERISA-governed plan, unless saved from preemption by other subsections of ERISA. *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 86 (2020) (citation omitted); *see also* 29 U.S.C. § 1144.

But particularly relevant here, ERISA is not concerned with "traditionally state-regulated substantive law in those areas where ERISA has nothing to say[.]"

Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 330 (1997); *see also, e.g.*, *Rutledge*, 592 U.S. at 87 ("Crucially, not every state law that affects an ERISA plan or causes some disuniformity in plan administration has an impermissible connection with an ERISA plan.").

Thus, while ERISA reaches claims—federal or state—that could have been brought under ERISA § 502(a) and relate to ERISA duties, or that impermissibly interfere with, and are not excepted from, ERISA's scheme, it goes no further. And any claim—federal or state—that could be brought and relates to duties under ERISA, save for an exception not relevant here, must be litigated (if at all) in federal court. Because the Fund's claims do not arise under or implicate ERISA, ERISA has no application here.

b. ERISA § 410 is inapplicable to matters not purporting to relieve an ERISA fiduciary of ERISA liability or responsibility.

As with the broader statute, the subsection of ERISA at the center of the Fund's defense and this appeal, ERISA § 410, also specifies limits. ERISA § 410(a) provides:

> (a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary **from responsibility or liability for any responsibility, obligation, or duty <u>under this part</u>** shall be void as against public policy.

29 U.S.C. § 1110(a) (emphasis added).

Because the Fund's defense turns on this statute, the Court must start with the text of the statute itself and, because that text is unambiguous, must apply its plain meaning. *See, e.g.*, *Riad v. Brandywine Valley SPCA, Inc.*, 319 A.3d 878, 883 (Del. 2024) ("If statutory text is unambiguous, this Court's role is limited to an application of the literal meaning of the statute's words. . . . If a statute is unambiguous, there is no need for judicial interpretation, and the plain meaning of the statutory language controls." (citations and quotations omitted)). This rule holds even though the Court is interpreting a federal statute. *See, e.g.*, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987) (construing ERISA's scope by focusing on "Congress' choice of language"); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (beginning with statute's text to determine Congress's intent).

The bolded language quoted above makes clear that it is concerned with only those agreements that purport to relieve ERISA fiduciaries of *certain* responsibilities and liabilities. The underlined language specifies those responsibilities and liabilities with which the statute is concerned: those arising under Part 4 of Subchapter I of ERISA, which is the "Fiduciary Responsibility" section of ERISA. 29 U.S.C. § 1110(a). *See, e.g.*, *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 933 n.9 (6th Cir. 2014) (explaining that ERISA § 410 does not address agreements that concern rights, duties, or obligations that arise outside of Part 4 of ERISA).

In accordance with the plain language of the statute, courts have consistently held that ERISA § 410 prohibits only agreements that purport to relieve ERISA fiduciaries of their responsibilities and liabilities. *See, e.g.*, *Pfahler v. Nat'l Latex Prods.*, 517 F.3d 816, 820 (6th Cir. 2007) (explaining that ERISA § 410 "prohibits agreements that diminish the statutory obligations of a fiduciary"); *Smith*, 769 F.3d at 933 n.9 (explaining that ERISA § 410 does not address agreements that concern rights, duties, or obligations that arise outside of Part 4 of ERISA).

That line of authority confirms the statute's scope. If § 410 extended beyond its plain text to sweep in indemnification or advancement provisions unrelated to ERISA fiduciary claims—like those at issue here—then courts could never have approved indemnification in any form. Yet they consistently have, drawing a clear line between impermissible exculpation, which erases ERISA fiduciary responsibility, and permissible indemnification, which simply allocates financial responsibility without altering ERISA duties. The fact that courts permit the latter confirms that § 410 is limited to agreements that purport to relieve fiduciaries of ERISA obligations. Altogether then, by its plain terms and consistent judicial application, § 410 governs only agreements that would erase liability or responsibility for ERISA fiduciary obligations. It does not extend to purely state-law matters, including contracts that shift financial responsibility without absolving fiduciaries of liability for their ERISA duties.

In short, ERISA § 410 only is concerned with agreements that might relieve an ERISA fiduciary of *responsibility or liability* for *ERISA fiduciary duties*. Conversely, on its face and for the reasons previously explained, the statute is inapplicable to pure matters of state law, including agreements that do not purport to exculpate an ERISA fiduciary from liability or responsibility for ERISA fiduciary duties.

Because the Fund's claims do not, and cannot, implicate ERISA fiduciary duties, and the advancement Defendants seek does not relieve them of responsibility or liability for any such duties, ERISA § 410 does not apply here.

2. ERISA § 410 is inapplicable here.

ERISA § 410 does not bar advancement here for at least two independent reasons: first, this case cannot result in imposition of ERISA responsibility or liability; and second, advancement here would be subject to repayment by Defendants, such that Defendants would receive no indemnification or exculpation if, in some other proceeding, they were found to have breached their fiduciary duties. The conclusion that ERISA § 410 does not bar advancement in cases like this one is consistent with longstanding case law and the DOL's expert interpretation of ERISA § 410.

a. The proceedings for which Defendants seek advancement do not implicate ERISA responsibility or liability.

ERISA § 410 does not bar advancement here because the Fund did not bring any ERISA claims and therefore cannot impose ERISA responsibility or liability. The Fund could not have brought any such claims in state court, and it cannot impose ERISA fiduciary liability or responsibility on Defendants through non-ERISA claims or an affirmative defense.

The claims for which Defendants seek advancement are not ERISA claims. The Fund has repeatedly disclaimed, to the Court of Chancery and to the District Court, that it brought any ERISA claims against Defendants. *See, e.g.*, Defendants' Brief for Motion for Enforcement (A01168-70); TRO Hearing Tr. (A01139:3-8) ("We understand that an affirmative claim to enforce ERISA under Section 502 falls in the exclusive jurisdiction of the federal court. We didn't bring that."); *see id.* at 50:15-23 (expressing view that the District Court lacked subject matter jurisdiction over the Fund's suit because the Fund asserted no ERISA claims and, instead, "basically want[ed] declaratory judgment as to an affirmative defense to a state cause of action"); June 7, 2024 Oral Argument Tr. (A00940:6-12) ("ERISA is not the basis for our underlying claims in our complaint[.]"); Fund Brief in support of Motion to Remand (A00726) ("The claims asserted in the Fund's complaint do not arise under federal law and could not have been brought in federal court."); *see also, e.g.*, *Housman v. Albright*, 857 N.E.2d 724, 733 (Ill. App. Ct. 2006) (rejecting argument ERISA preempted claims for breaches of fiduciary duties under Delaware law because "plaintiffs . . . brought th[e] action against the defendants in their separate capacities as the officers and directors of the corporation, not in their capacities as plan fiduciaries").

The Fund should be held to these prior assertions, which it agrees earned it a remand earlier in this case. Indeed, the Fund is judicially estopped from controverting them now. *See, e.g.*, *BE & K Eng'g Co., LLC v. RockTenn CP, LLC*, 2014 WL 186835, at *7-12 (Del. Ch. Jan. 15, 2014), *aff'd*, 103 A.3d 512 (Del. 2014) (binding party to judicial admissions as to governing agreements); *Julian v. E. States Constr. Serv., Inc.*, 2009 WL 1211642, at *6 (Del. Ch. May 5, 2009) (finding judicial estoppel prohibited party from changing legal argument as to effect of agreement); *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *15 (Del. Ch. Dec. 4, 2007) (applying judicial estoppel to bar party from pursuing claims it previously had disclaimed); *see also, e.g.*, Fund District of Delaware Complaint (A01076) ¶ 50 (agreeing it obtained remand because it represented that its complaint contained "no federal claims").

In any event, the Fund cannot subject Defendants to ERISA fiduciary liability or responsibility in these state-court proceedings that involve only state-law claims. To do so, the Fund would have needed to bring *an ERISA claim*. *See, e.g.*, *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1132 (Del. 2009) (referring to "a claim or cause of action" as the manner "to establish civil liability"); *Golden v. ShootProof Holdings, LP*, 2023 WL 2255953, at *15 (Del. Ch. Feb. 28, 2023) (explaining plaintiff cannot "establish liability" under a statute because he "failed to state the requisite claim").

Moreover, the Fund faces a catch-22 here given the strict jurisdictional limitations on where ERISA claims may be brought. If the Fund *had* brought an ERISA claim, its fiduciary would have needed to do so in federal court, as the Court of Chancery would have lacked jurisdiction. *See supra* Section I.C.1.a; 29 U.S.C. § 1132(e)(1); *see also, e.g.*, *Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Tr. Fund*, 538 F.3d 594, 596 (7th Cir. 2008) ("Artful pleading on the part of a plaintiff to disguise federal claims by cleverly dressing them in the clothing of state-law theories will not succeed in keeping the case in state court. In these instances, the federal law has effectively displaced any potential state-law claims."). Thus, if the Fund had sought to subject Defendants to ERISA liability, then this matter would have no business in state court, and because the Fund is not seeking to subject Defendants to ERISA liability, ERISA § 410 has no application here.

Nor can the Fund use an affirmative defense to subject Defendants to ERISA responsibility or liability. An affirmative defense does not "establish liability for unlawful actions." *Breitigan v. New Castle Cnty.*, 2005 WL 3544296, at *9 n.9 (D.

Del. Dec. 27, 2005); *see, e.g.*, *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 107 (D.C. Cir. 2016) (rejecting argument that party can obtain relief from affirmative defense because "affirmative defenses made '[i]n respon[se] to a pleading are not themselves claims for relief" (brackets and quotations omitted) (quoting Fed. R. Civ. P. 8(c)); *Driver v. Pro Ag Mgmt., Inc.*, 320 F. Supp. 3d 954, 955 (M.D. Tenn. 2018) (explaining that only claims, not affirmative defenses, "provide an avenue for an award . . ." (citation omitted)).

Rather, affirmative defenses "provide[] the defendant with an opportunity to escape liability." *Breitigan*, 2005 WL 3544296 at *9 (emphasis added); *see also, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. City Sav., F.S.B.*, 28 F.3d 376, 393 (3d Cir. 1994), *as amended* (Aug. 29, 1994) (observing that "a defense or an affirmative defense is neither an 'action' nor a 'claim,' but rather is a *response* to an action or a claim" (emphasis in original)); Del. Ch. Ct. R. 8 (distinguishing between claims for relief and defenses to claims).

Moreover, if the Fund's affirmative defense were sufficient to implicate ERISA § 410, then this case would have been preempted. Because the capacity in which the Fund asserted its affirmative defense must be the same capacity in which it asserted its claims, a holding that ERISA § 410 applies to this proceeding would mean that the Fund asserted its claims as an ERISA fiduciary against Defendants as former ERISA fiduciaries. *See* Del. Ch. Ct. R. 8 ("In responding to a pleading, a party must: (A) state in short and plain terms *its* defenses to each claim asserted against *it* . . ." (emphasis added)); *see e.g.*, *Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806, 812 n.13 (Del. 2016) (rejecting plaintiffs' attempt to save claims by switching capacity in which they asserted them because their pleading gave no indication that they were asserting claims in later-invoked capacity and because the trial court would have had no jurisdiction over such claims). But had the Fund asserted claims as an ERISA fiduciary (it did not), ERISA would have preempted them. *See, e.g.*, *Asbestos Workers Loc. Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935 (Del. 2007) (finding ERISA completely preempted the plaintiff fund's claim because the claim "duplicat[ed] or supplement[ed] a civil enforcement remedy available" under ERISA); *Bixler v. Cent. Penn. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1298-99 (3d Cir. 1993) (observing that ERISA § 502(a)(3) is the mechanism for obtaining equitable relief to redress "a breach of the statutorily created fiduciary duty" under ERISA).[1]

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[1] *See also Varity Corp. v. Howe*, 516 U.S. 489, 510 (1996) (addressing use of ERISA § 502(a)(3) to redress alleged violations of ERISA fiduciary duties); *Taylor v. Sheet Metal Workers' Nat'l Pension Fund*, 2025 WL 36348, at *3 (D.N.J. Jan. 3, 2025) ("§ 502(a)(2) addresses 'the possible misuse of plan assets, and with remedies that would protect the entire plan'" (quoting *Russell*, 473 U.S. at 142); *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266, 272 (3d Cir. 2001) (confirming proper party may obtain declaratory and injunctive relief on ERISA-related rights through ERISA § 502(a)); *Pell v. E.I. DuPont de Nemours & Co. Inc.*, 539 F.3d 292, 306 (3d Cir. 2008) (confirming that "ERISA provides for the issuance of injunctions" under § 502(a)).

Finally, the Fund cannot obtain rulings on state-law claims and transform those rulings into ERISA liability on unpled ERISA claims. A plaintiff cannot use a "state law enforcement vehicle for federal mandates." *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 25 (Del. Ch. 2009). Moreover, Delaware and federal law alike require a plaintiff who seeks "to establish civil liability" for a particular claim to "plea[d] and prov[e]" the elements of that claim. *A.W. Fin. Servs., S.A.*, 981 A.2d at 1132; *see also, e.g.*, *Martinez v. E.I. DuPont De Nemours & Co., Inc.*, 82 A.3d 1, 15 (Del. Super. Ct. 2012), *aff'd*, 86 A.3d 1102 (Del. 2014), *as revised* (Mar. 4, 2014) (allegations must be "sufficient enough to put the opposing party on notice of the claim brought against it").

Here, however, the Fund did not plead claims for alleged breaches of fiduciary duties, let alone for breaches of ERISA fiduciary duties. And those two things are not the same. *See, e.g.*, *Troudt v. Oracle Corp.*, 2019 WL 1006019, at *4 (D. Colo. 1, 2019) (explaining that "while the law of trusts often will inform determination of issues under ERISA, it will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties" (quotations and citation omitted)). In fact, the Fund's claims, which relate to Delaware contract/corporate law, implicate different legal standards than the fiduciary duties that would arise under Delaware trust law, were it transposable with ERISA (which it is not). *See, e.g.*, *Stegemeier v. Magness*, 728 A.2d 557, 562-64 (Del. 1999) (explaining at length why "the standard of fiduciary duty of a corporate director [under Delaware law is different from] that of a trustee of a trust”).

In short, permitting the Fund to use its state-law claims as a backdoor to some kind of ERISA liability or responsibility, as would be necessary to trigger ERISA § 410, would violate ERISA and decades of precedent establishing its preemptive force. *See* 29 U.S.C. §§ 1132(e)(1) (giving federal courts exclusive jurisdiction over ERISA breach of fiduciary duty claims), 1144(a) (providing for preemption); *Menkes v. Prudential Ins. Co. of Am.*, 762 F.3d 285, 296 (3d Cir. 2014) (observing ERISA preempts state causes action that would be alternative to or supplement ERISA because they “‘conflict[] with Congress’ clear intent to make the ERISA mechanism exclusive’” (citation omitted)); *Barber v. Unum Life Ins. Co. of Am.*, 383 F.3d 134, 140 (3d Cir. 2004) (citation omitted) (similar); *Brewster*, 940 A.2d at 937 (rejecting parallel state-law claims by fund as non-cognizable in state court because Congress has made “the ERISA remedy exclusive under § 502(a)”).

It is precisely because the Fund is pursuing claims that have nothing to do with ERISA that the Fund was able to proceed on its state law claims in state court.

No law permits the Fund to bootstrap unasserted ERISA fiduciary liability into its state-law contract claims, and the Court of Chancery erred by holding otherwise.

b. Advancement here does not relieve Defendants of any ERISA liability or responsibility because it is subject to repayment.

ERISA § 410(a) is inapplicable to the advancement Defendants seek for the additional reason that any advancement to Defendants in this matter is subject to recoupment, and thus does not amount to "exculpation" of ERISA fiduciary's duties or liabilities under ERISA or any other law. *See Harris v. GreatBanc Trust Co.*, 2013 WL 1136558, at *3 (C.D. Cal. Mar. 15, 2013) (holding that a provision allowing for indemnification until a final judgment finding breach of fiduciary duties under ERISA did not run afoul of Section 410(a)); *Moore v. Williams*, 902 F. Supp. 957, 967 (N.D. Iowa 1995) (awarding advancement under Section 410(a) "until and unless [the defendant] is determined to be liable on plaintiff's claims that he breached fiduciary duties [under ERISA]"); *In re Volpitto*, 455 B.R. 273, 294 (Bankr. S.D. Ga. 2011) (distinguishing advancement of costs incurred defending ERISA fiduciary breach claims from ERISA fiduciary liability or responsibility to which § 410 is directed); *Walsh v. Reliance Tr. Co.*, 2023 WL 1966921, at *20 n.22 (D. Ariz. Feb. 13, 2023) (citing DOL's 1977 guidance that contract provision permitting advancement of defense costs to plan fiduciaries "did not violate ERISA's prohibition on indemnification of fiduciaries" and declining to find "advancement of defense costs is improper in all circumstances").

Advancement is a "loan" or "credit" that must be repaid under certain circumstances. *See, e.g.*, *Gilbert v. Unisys Corp.*, 2024 WL 3789952, at *8 (Del. Ch. Aug. 13, 2024) ("[A] right to advancement is, effectively, a loan."); *see also Winshall v. Viacom Intern., Inc.*, 76 A.3d 808, 822 (Del. 2013) (explaining advancement is "the right to payment of 'litigation expenses as they are incurred regardless of whether [the party] will ultimately be entitled to indemnification'"); 8 *Del. C.* § 102(b)(7) (permitting corporations to adopt provisions eliminating monetary liability for breach of duty of care); *Mennen v. Fiduciary Tr. Int'l of Del.*, 166 A.3d 102 (Del. 2017) (Table) (observing exculpatory clauses insulate a fiduciary from liability); 6 *Del. C.* § 17-1101(d) (permitting limited partnership agreement to eliminate duties); 6 *Del. C.* § 18-1101(c) (permitting same for limited liability companies). Consistent with this principle, the contract provisions in this case require the Fund to advance Defendants' defense costs unless and until it is "ultimately determined that such Indemnified Person is not entitled to be indemnified," at which point Defendants would be obligated to repay the advanced amount. LPA (A00117 §3.03(e)).

The Northern District of Illinois's holding in *Central States, Southeast & Southwest Areas Pension Fund v. American National Bank & Trust Company* is on point. 1979 U.S. Dist. LEXIS 8931 (N.D. Ill. Oct. 26, 1979) (A01992). There, former and current investment managers of an ERISA governed pension fund sought advancement for litigation expenses incurred defending allegations of ERISA fiduciary breaches while acting as the fund's investment manager.[2] *See id.* at *1-6. The fund refused to honor the former fiduciaries' contracted-for advancement on grounds like those the Fund invokes here: that it had no contractual obligation to pay advancement to the former fiduciaries under terminated contracts and that payment would violate ERISA § 410. *See id.* at *7.

The court rejected the fund's arguments. Like the Court of Chancery here, the *Central States* court agreed that termination of the investment management agreements did not affect the former managers' advancement rights. *See id.* at *8. But the *Central States* court also held that because "reimbursement of litigation costs does not shield a fiduciary from any liability or responsibility whatsoever; it merely covers legal fees and litigation costs," ERISA § 410 did not bar the contemplated advancement, either. *See id.* at *10-11.

While other federal courts have concluded that "a plan's advancement of attorneys' fees has the same result as an exculpatory clause" that comes within the scope of § 410, those decisions fail to distinguish between (on the one hand) exculpatory clauses that eliminate monetary liability for a breach of duty and (on the

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[2] Thus, unlike in this action, the former fiduciaries seeking advancement faced the prospect of ERISA fiduciary liability in litigation for which they were seeking advancement of defense costs.

other hand) advancement provisions—like the provisions here—that require repayment if a breach is found. *See, e.g.*, *Sec'y of U.S. Dep't of Lab. v. Kavalec*, 2020 WL 3977347, at *8 (N.D. Ohio July 14, 2020) (discussing this authority). In the latter case, the advancement provision cannot "relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty" under ERISA. 29 U.S.C. § 1110(a).

c. Treating ERISA § 410 as inapplicable here accords with case law and Department of Labor guidance.

i. Case law confirms that ERISA § 410 does not apply here.

Case law confirms that ERISA § 410 does not categorically bar advancement to ERISA fiduciaries from plan assets.

As federal courts have repeatedly recognized, ERISA § 410 "does not prevent advancement of expenses," even from plan assets, "until liability is determined." *Moore*, 902 F. Supp. at 966-67. Nor does it prevent indemnification of ERISA fiduciaries from ERISA plan assets when the indemnification is for defense of state-law claims—as opposed to claims for breaches of ERISA fiduciary duties. *See Leigh v. Engle*, 858 F.2d 361, 369 (7th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989) ("While an award of fees to a losing defendant certainly would contravene Congress' intent, *see* 29 U.S.C. § 1110(a), plaintiffs point us to no statutory or common-law basis for denying fees to a *prevailing* trustee where the trust documents specifically contemplate such reimbursement."); *Leigh v. Engle*, 669 F. Supp. 1390, 1414 (N.D. Ill. 1987) ("Nothing in ERISA prohibits a trust from indemnifying its fiduciaries for legal expenses unrelated to breaches of their [ERISA fiduciary] duties."), *aff'd*, 858 F.2d 361 (7th Cir. 1988); *Leigh v. Engle*, 714 F. Supp. 1465, 1470 (N.D. Ill. 1989) (rejecting argument ERISA § 410 prohibited reimbursement of plan fiduciaries from plan assets), *amended on other grounds*, 723 F. Supp. 1272 (N.D. Ill. 1989); *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907, 913 (8th Cir. 1994) (approving ERISA plan's payment of the attorneys' fees plan fiduciaries incurred in successfully defending claims for alleged breaches of ERISA fiduciary duties); *In re Volpitto*, 455 B.R. at 294-96 (expressly rejecting argument that plan fiduciary's use of plan assets to advance funds for the attorneys' fees incurred in defending ERISA fiduciary breach claims was improper).

Indeed, as more than one federal court has observed: "How could anyone take seriously the proposition that ERISA forbids the indemnification of fiduciaries wrongly accused of misconduct, when ERISA itself allows a court to award fees to the prevailing side?" *Moore*, 902 F. Supp. at 964 (quoting *Packer Eng'g, Inc. v. Kratville*, 965 F.2d 174,176 (7th Cir. 1992)); *see also, e.g.*, *State St. Bank & Tr. Co. v. Salovaara*, 326 F.3d 130, 138 (2d Cir. 2003) (observing that "Section 410 simply imposes a flat bar on any fiduciary that has been found to have violated its duty to the plan from recouping its expenses from the very plan it injured," and noting "the proposition that some indemnification agreements are permitted by ERISA . . . is not in dispute"); *Lawrence v. Potter*, 2018 WL 3625329, at *15 (D. Utah July 30, 2018) (declining to dismiss ERISA fiduciary's indemnification claim because "[i]f it is determined that [she] did not violate her fiduciary duties, as she contends, there would be no basis to deny indemnification").

ii. The DOL agrees that ERISA § 410 does not bar all payments to ERISA fiduciaries from ERISA plan assets.

The DOL—the agency charged with enforcing ERISA—has repeatedly issued guidance stating that ERISA § 410 does not prohibit advancement to an ERISA fiduciary in circumstances like those presented here.

In 1977, the DOL issued an opinion stating that advancement is proper and valid, and not restricted by ERISA § 410(a). U.S. Dep't of Labor, Advisory Opinion No. 77-66/67A (E.R.I.S.A.), 1977 WL 5446. Specifically, the Secretary of Labor opined that "the indemnification provisions in question," which required "[e]xpenses incurred in defending a civil or criminal action, suit or proceeding" to be paid "in advancement of the final disposition of such action, suit or proceeding upon receipt of an undertaking by such person to repay such amount" if found liable, did not contravene the provisions of section 410(a) of the Employee Retirement Income Security Act of 1974 (ERISA)." *Id.* at *8, *12. It has never retracted this opinion or issued a contrary one. *See Walsh*, 2023 WL 1966921, at *21 n.22 ("Assuming the

Secretary is concerned with the advancement of litigation expenses for the Director Defendants, the Secretary has not established such advancement would be improper. In 1977, the Department of Labor stated a contract provision allowing for the advancement of defense costs did not violate ERISA's prohibition on indemnification of fiduciaries. DOL Opinion Letter, 1977 WL 5446 (Sep. 9, 1977). And the Secretary has not cited any more recent authority establishing advancement of defense costs is improper in all circumstances.").

Instead, the DOL has consistently opined that using ERISA plan assets for attorneys' fees that a fiduciary incurs in connection with defending claims based on fiduciary conduct does not itself relieve the fiduciary of ERISA liability or responsibility in violation of ERISA § 410. For example, the DOL has stated that agreements allowing ERISA fiduciaries to recover, from ERISA plan assets, the "costs or damages, including attorneys' fees, which could be assessed against" the fiduciaries for plan actions are "not prohibited by section 410(a) of ERISA," so long as the agreements "[do] not relieve the [fiduciaries] of any liability for their breach of fiduciary responsibility." DOL Adv. Op. 93-15A (May 18, 1993), (A02000 at 1 and 3); *see also, e.g.*, DOL Adv. Op. No. 84-01A (Jan. 4, 1984), (A02006); DOL Adv. Op. No. 84-02A (Jan. 4, 1984), (A02010); DOL Adv. Op. 93-16A (May 18, 1993),(A02014); DOL Adv. Op. 93-18A (May 28, 1993),(A02019); DOL Op. Ltr., 1994 ERISA LEXIS 76 (Nov. 28, 1994), (A02023); DOL Op. Ltr., 1994 ERISA

LEXIS 77 (Nov. 28, 1994),(A02030). Thus, the DOL has recognized that advancement does not entail relieving a fiduciary of liability. *See, e.g.*, (A02014 at 3) ("If the indemnification agreement contemplated in this case purports to reimburse the Legal Services Plan for any sums which it may have to pay as a result of this transaction, but does not relieve the Trustees of any liability for their breach of fiduciary responsibility, we are of the opinion that such agreement is not prohibited by section 410(a) of ERISA.").

3. The Court of Chancery erred in ruling that ERISA § 410 bars advancement here.

As the foregoing illustrates, ERISA § 410 does not bar all payments to ERISA fiduciaries from ERISA-governed assets. It is inapplicable to contractual provisions that do not "purport[] to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under" ERISA. 29 U.S.C. § 1110(a). And as explained above, the advancement provisions here cannot and do not relieve Defendants from any ERISA responsibility or liability. Besides contravening the statute's plain text, longstanding case law, and DOL guidance, the Court of Chancery's holding cannot be justified on its own terms.

a. *Koresko* does not support the Court of Chancery's decision.

Following the Fund's lead, the Court of Chancery relied almost exclusively on *Secretary United States Department of Labor v. Koresko*, 646 F. App'x 230

(3d Cir. 2016) (unpublished) to justify its interpretation of ERISA § 410. But that decision cannot carry the weight the court placed on it.

First, *Koresko* is non-precedential and therefore binds only the parties in that case. *See* Third Cir. I.O.P. 5.3 (describing such non-precedential opinions as "appear[ing] to have value only to the trial court or the parties"), 5.7 ("Such opinions are not regarded as precedents."); *see also* (A01145:13-18) (District Court explaining to the Fund and Defendants that *Koresko* should not be treated as precedential because when the Third Circuit "say[s] it's non-precedential, they really mean it's non-precedential"). Indeed, in *Koresko*, the court of appeals took the unusual step of emphasizing that it had "writ[ten] only for the benefit of the parties." *Koresko*, 646 F.App'x at 233. Such a decision, standing alone, is a vanishingly thin reed on which to base a sweeping construction of a federal statute.

Second, the court of appeals' ruling in *Koresko* has no bearing here given the materially different factual circumstances presented in that case. *Koresko* was a government enforcement action brought under ERISA. 646 F. App'x at 232. The case involved only ERISA claims in federal court. *See id.* ("The District Court found that Koresko breached fiduciary duties he owed to employee welfare benefit plans under ERISA."). There were no state law claims at issue. *See id.* Accordingly, in that case—unlike this one—the plaintiff's claims *could* have given rise to ERISA liability.

Moreover, the specific language of the advancement and indemnification provision in *Koresko* was materially different from the provision at issue here. The provision here allows indemnification only "[t]o the fullest extent permitted by applicable law," and requires repayment of any amounts to which the recipient is determined not to be entitled to indemnification, including for "actions or omissions" that constitute "Disabling Conduct." LPA (A00116-17 §§3.03(b) & (e)). Thus, if Defendants were found to have breached ERISA fiduciary duties in this case (impossible, because the Court of Chancery lacks jurisdiction over such claims), Defendants would not be entitled to indemnity.

The *Koresko* provision, on the other hand, required advancement "unless it [was] alleged and until it [was] conclusively determined that such Claims [arose] from the Trustee's own negligence or willful breach of its obligations specifically undertaken pursuant to th[e] Agreement," and, even then, contained no explicit repayment requirement. (A1120) (Ex. KK to appendix of exhibits filed on Dec. 7, 2015 in *Sec'y U.S. Dep't of Labor v. Koresko,* No. 15-2470). On its face, then, and unlike the provision here, the provision in *Koresko* expressly authorized payment, without explicitly requiring repayment, to the ERISA fiduciary from ERISA plan assets for acts that may have breached ERISA fiduciary duties.

Third, and in any event, the Court of Chancery erred by attributing to the Third Circuit, based on that court's non-precedential opinion, an atextual interpretation of

ERISA § 410 applicable to circumstances not before it. The better reading of *Koresko* is that the Third Circuit gave ERISA § 410, and the related DOL guidance, its plain meaning, which limits the scope of § 410 to claims arising under ERISA.

The court of appeals in *Koresko* began the relevant analysis by observing that "when an ERISA fiduciary writes words in an instrument *exonerating itself of fiduciary responsibility,* the words, even if agreed upon, are generally without effect." 646 F. App'x at 244 (emphasis added) (citation omitted); *see Perez v. Koresko*, 2015 WL 2236692 at *3 (E.D. Pa. May 13, 2015). And the court of appeals cited a Department of Labor regulation interpreting ERISA § 410 to void "any arrangement for indemnification of a fiduciary of an employee benefit by the plan," because "[s]uch an arrangement would have the same result as an exculpatory clause." *Koresko*, 646 F. App'x at 244 (quoting 29 C.F.R. § 2509.75-4). Accordingly, the court held only that ERISA § 410 bars a contractual provision that facially mandated that ERISA plan assets be used to indemnify and advance defense costs an ERISA fiduciary incurred for violating his ERISA fiduciary duties, without any expectation of repayment. *Id.* at 243-45.

That reading of *Koresko* harmonizes the Third Circuit's approach with that of other courts that have examined and held permissible advancement provisions, even from ERISA-governed assets. *See Koresko*, 646 F. App'x at 244 (considering "Koresko's reliance on *this provision*," and rejecting Koresko's attempt to rely on

Harris v. GreatBanc Tr. Co. because the indemnification provision in that case was "distinguishable"); *Harris v. GreatBanc Tr. Co.*, 2013 WL 1136558, at *1 (C.D. Cal. Mar. 15, 2013) (refusing to strike demand for advancement and indemnification based on specific text of provision at issue); *Packer*, 965 F.2d at 175 (allowing indemnification based on text of provision); *Walsh*, 2023 WL 1966921 at *20 n. 22 (allowing advancement); *Moore*, 902 F. Supp. at 967 (allowing advancement); *see also supra* Section I.C.2.c.i.

That reading also harmonizes the Third Circuit's approach with more analogous DOL guidance. In fact, the parties' provision here is much closer to a provision the DOL found *lawful* shortly after ERISA's enactment. That provision, like the parties', also permitted indemnification and advancement "[t]o the fullest extent permitted by law," and required repayment if the fiduciary was found to have breached any of its duties or responsibilities. DOL Opinion Letter, 1977 WL 5446, at *8. And because the law permits advancement to and indemnification of ERISA fiduciaries, even from ERISA plan assets, when it would not relieve the fiduciary of liability or responsibility for ERISA fiduciary duties, the parties' provision in this case, like the provision the DOL considered, is lawful. *See, e.g.*, *Walsh*, 2023 WL 1966921 at *20-21 (finding indemnification provisions that contained limitations "that indemnification will be allowed 'unless otherwise prohibited by law,' [and] 'to the extent permitted by applicable law,' . . . [were] not, on their face, unlawful" because by "prohibit[ing] indemnification in the event such indemnification is prohibited by law," the provisions, in effect "remove[d] any possibility indemnification will occur if doing so would violate ERISA"); *Lawrence*, 2018 WL 3625329 at *15 (refusing to dismiss indemnification claim because provision applied only "to the extent permitted by law," so "there would be no basis to deny indemnification" if fiduciary was absolved of alleged ERISA fiduciary breaches).

b. ERISA policy likewise does not support the Court of Chancery's interpretation of ERISA § 410.

This Court need not consider policy rationales to reject the argument that ERISA § 410 precludes Defendants' advancement. *See, e.g.*, *Opinion of the Justs.*, 290 A.2d 645, 647 (Del. 1972) (explaining "there is no room for judicial interpretation, construction, or search for intent," including through consideration of legislative history, when provision is unambiguous); *Wylain, Inc. v. TRE Corp.*, 412 A.2d 338, 347 (Del. Ch. 1979) ("[W]here ambiguity is lacking there is no room for judicial construction and no need to review the legislative history."). But were this Court to engage in that consideration, policy likewise supports rejecting the Court of Chancery's overbroad reading of ERISA § 410.

As explained above, ERISA § 410 does not, by its terms, prohibit ERISA plans from advancing fees to plan fiduciaries for expenses they incur unrelated to breaches of ERISA fiduciary duties. That deliberate, legislative choice must be respected. *See supra* Section I.C.1.a (citing *Knudson*, *Russell*, and *Mackey* for rule that ERISA's detail "provides strong evidence" that Congress made deliberate choices about legislative scheme that courts should not "tamper with").

And that is particularly so where, as here, Congress's choice reflects an effort, consistent with principles of federalism, not to intrude into matters of traditional state-law concern like advancement and indemnification. *See, e.g.*, *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997) (explaining that courts must start from the presumption "that Congress does not intend to supplant state law"); *see also, e.g.*, *Dillingham Const.*, 519 U.S. at 331 (applying similar rule). Indeed, the U.S. Supreme Court has declined to construe federal statutes, including ERISA, to "intru[de] into state sovereignty" absent a "clea[r] signa[l]" from Congress. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488-89 (1996); *see also, e.g.*, *Travelers*, 514 U.S. at 654. This Court should take the same approach.

In addition, if Congress had adopted the Court of Chancery's approach, that choice would have been self-defeating. In practice, it would be difficult, if not impossible, for some ERISA-governed plans "to retain highly-qualified, independent, professional managers" absent indemnification and advancement provisions, particularly for plans that have only ERISA-governed assets, like multi-employer plans. *See* DOL Opinion Letter, 1977 WL 5446, at *9 (observing that funds must be able to offer contractual indemnification and advancement to plan fiduciaries); *see also, e.g.*, *Packer*, 965 F.2d at 175 (reasoning that "[a] plan with a choice between retaining a risk-averse fiduciary willing to serve only with a promise of indemnity (or insurance, or a higher salary) and hiring a high roller willing to take big gambles (including the gamble of paying a year's income to his lawyer even if he has done no wrong) may well conclude that the timorous manager is the one to have—that risk-takers ought not be at the helm of pension funds"); *FirsTier Bank*, 16 F.3d at 913 (noting plan's ability to contract for reimbursement of fiduciary's fees "make[s] it easier for pension plans to engage the services of persons unwilling or unable to bear the costs of legal contests" (quoting *Packer*, 965 F.2d at 175)).

c. The Court of Chancery's interpretation of ERISA § 410 would upset settled Delaware law favoring advancement.

Federal and state interests align here, as Delaware courts likewise recognize that advancement and indemnification promote sound governance. Delaware courts routinely uphold indemnification agreements under § 145 of the Delaware General Corporation Law, which authorizes corporations to indemnify and advance legal fees to directors and officers. *See* 8 *Del. C.* § 145. That is because doing so furthers the Delaware legislature's goal of encouraging capable individuals to serve in those positions "secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporations they serve." *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002). And as this Court has explained, advancement in particular reflects "a desirable underwriting of risk by the corporation in anticipation of greater corporate-wide rewards" for shareholders. *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 218 (Del. 2005). This Court therefore analyzes agreements under § 145 with an eye towards furthering the Delaware legislature's overarching goal of incentivizing qualified individuals to serve as officers and directors, which leads to better corporate governance.

The Court should do the same here, as Congress had an analogous goal in enacting ERISA § 410. As the Seventh Circuit has explained, § 410 allows plans to attract qualified individuals to serve as fiduciaries who would otherwise refuse to do so out of fear of the astronomical costs associated with defending legal claims related to their fiduciary decision making. *Packer*, 965 F.2d at 175-76. Without such a provision, otherwise-qualified individuals would refuse to serve as fiduciaries, which would frustrate Congress's overarching goal of good plan governance.

At bottom, the same public policy goals underlie both ERISA § 410 and Delaware General Corporation Law § 145—promoting good plan and corporate governance by ensuring qualified individuals serve as fiduciaries or corporate officers and directors. Awarding Defendants advancement for defense of the Fund's state-law claims affords them the advancement they were promised, preserves the advancement rights of directors and officers for defense of state-law liability, and leaves federal ERISA policy regarding ERISA fiduciary duties undisturbed. A contrary approach presents only downside: construing a federal law more broadly than Congress wrote it to interfere with advancement rights Delaware's policy clearly supports for defense of state-law claims unsettles state law, federal law, and the already existing advancement rights officers and directors relied on in agreeing to serve their Delaware corporate entities.

CONCLUSION

By its express terms, ERISA § 410 is concerned with agreements that relieve a fiduciary from responsibility or liability for ERISA fiduciary duties. Awarding Defendants advancement for expenses incurred defending state-law claims does not trigger that concern because such claims can never result in Defendants being held "responsib[le] or liab[le] for any responsibility, obligation, or duty" that ERISA's fiduciary duty subpart imposes—the trigger for ERISA § 410's application. And, even if the Fund's claims were proper ERISA claims (which they cannot be), the parties' advancement agreement does not relieve Defendants from responsibility or liability for ERISA fiduciary duties. The Court of Chancery's contrary ruling should be reversed, and judgment should be entered in Defendants' favor on their counterclaims for advancement.

OF COUNSEL:

John Ursu
Josh Peterson
FAEGRE DRINKER
BIDDLE & REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000

Stephanie L. Gutwein
FAEGRE DRINKER
BIDDLE & REATH LLP
300 N. Meridian St., Suite 2500
Indianapolis, Indiana 46208
(317) 237-0300

FAEGRE DRINKER
BIDDLE & REATH LLP

/s/ Todd C. Schiltz
Todd C. Schiltz (#3253)
Oderah C. Nwaeze (#5697)
Renée M. Dudek (#6623)
FAEGRE DRINKER
BIDDLE & REATH LLP
222 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801
(302) 467-4200
todd.schiltz@faegredrinker.com
oderah.nwaeze@faegredrinker.com
renee.dudek@faegredrinker.com

Counsel for Defendant and
Counterclaim-Plaintiff
Cindy Chen Delano

RICHARDS, LAYTON & FINGER, P.A.

/s/ Rudolf Koch

Rudolf Koch (#4947)
Robert L. Burns (#5314)
Susan Hannigan Cohen (#5342)
Nicole M. Henry (#6550)
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700
koch@rlf.com
burns@rlf.com
scohen@rlf.com
henry@rlf.com

Counsel for Defendants/ Counterclaim Plaintiffs Invictus Global Management, LLC, Invictus Special Situations I GP, LLC, and Amit Patel

WORDS: 9,919 / 10,000

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