IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

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NATURE OF THE PROCEEDING

Appellee/Plaintiff Invictus Special Situations Master I, L.P. ("Fund"), commenced a narrow, summary proceeding in the Delaware Court of Chancery to enforce its rights to information, books and records and to preserve and recover nearly $10 million of the Fund's cash that Appellants/Defendants, the Fund's former managers, wrongfully withheld after being removed. The summary relief sought by the Fund did not require the invocation of U.S. federal law. As set forth in Vice Chancellor Cook's ruling below, judgment has already been entered in the Fund's favor on its summary claims, as this ERISA advancement dispute was presented "after I have already concluded in this action that defendants breached the Partnership Agreement by misappropriating nearly $10 million of Fund assets…." (A02156-57).

Appellants/Defendants, Invictus Global Management, LLC ("IGM"), Invictus Special Situations I GP, LLC ("Invictus GP"), Amit Patel ("Patel") and Cindy Chen Delano ("Delano," and collectively, "Defendants") voluntarily expanded the scope of the proceedings by counterclaiming for fee advancement, which on its face is governed by Cayman law and subject to an affirmative federal defense under ERISA. Defendants strategically withheld information and money, and added the threat of fee advancement, to obtain leverage over the Fund, both in anticipation of ERISA fiduciary duty claims and their own contemplated offensive claims.

While Delaware Courts usually address fee advancement as a summary proceeding, this case presented unique circumstances. Defendants are ERISA fiduciaries, the Fund manages ERISA plan assets, and ERISA prohibits advancement of legal fees to ERISA fiduciaries from ERISA plan assets, as unambiguously held by the United States Court of Appeals for the Third Circuit in *Koresko*. *Sec'y of U.S. Dep't of Labor v. Koresko*, 646 F. App'x 230, 244 (3d Cir. 2016). Thus, while disposition of the *Fund's summary claims* did not involve federal law, the Fund properly raised ERISA as an affirmative defense to the Defendants' counterclaims.

The procedural machinations that followed reflect the uniqueness of this case. As explained by Vice Chancellor Cook in his decision below, "this case has been in front of the U.S. District Court for the District of Delaware ["District Court"] multiple times now." (A02152). After the Fund raised its affirmative ERISA defense, Defendants removed the case to the District Court. Judge Andrews swiftly remanded, because a federal *defense* (to a counterclaim no less) does not create federal jurisdiction. Defendants never challenged Judge Andrews' remand ruling. Then, at summary judgment, when Vice Chancellor Cook expressed reluctance as to whether to wade into matters of ERISA, Defendants urged the court to rule on advancement solely as a matter of contractual interpretation, and to leave the ERISA defense for a federal court to decide (due process notwithstanding). Vice Chancellor Cook took Defendants up on their suggestion, granted advancement solely based on the underlying contract, and expressly "preserved" the ERISA defense to be litigated in federal court.

Consistent with that original ruling, the Fund commenced a limited-purpose federal action to request a ruling on the ERISA defense to advancement. Once that action was filed, as contemplated by Vice Chancellor Cook's ruling, the Court of Chancery stayed its prior advancement order to give the District Court an opportunity to address the issue. Defendants, however, despite having urged the Court of Chancery to defer to the District Court in the first place, reversed position and argued to the District Court that *it* lacked jurisdiction to decide the issue. Judge Andrews, consistent with his earlier remand ruling, agreed that the District Court lacked jurisdiction to decide a federal *defense* to an otherwise non-federal advancement claim originally filed as a counterclaim in state court. The federal case was dismissed and the parties returned to Vice Chancellor Cook, who, in light of the federal court's ruling, agreed to rule on the preserved ERISA defense, as the Fund had requested all along.

After briefing and oral argument, the Court of Chancery undertook an extensive analysis of ERISA's restriction on legal fee advancement, and correctly determined that ERISA does indeed prohibit advancement here, relying in large part on the Third Circuit's *Koresko* decision as well as the court's prior rulings on the Fund's summary claims. This Appeal follows.

SUMMARY OF ARGUMENT

1. **DENIED**. Vice Chancellor Cook correctly applied unambiguous Third Circuit case law holding that section 410 of ERISA renders void any provision of a contract purporting to relieve a fiduciary from fiduciary responsibility, duty or liability. Advancement by an ERISA plan has the same result as an exculpatory clause by relieving the fiduciary of personal liability to the plan.

2. **DENIED**. The Third Circuit Court of Appeals spoke with unambiguous words: "[p]lan indemnification provisions that allow the plan to indemnify a fiduciary are considered void." *Koresko*, 646 F. App'x at 244. That is exactly what Defendants seek here – advancement and indemnification *by an ERISA plan*. Defendants try to redirect the inquiry to the specific claims and relief sought in litigation, but it is the fiduciary's conduct, not the claim asserted in litigation, that is determinative.

3. **DENIED**. Advancement and indemnification provisions are commonly subject to repayment, including those that have been found to be void under section 410 of ERISA. Moreover, federal case law and Department of Labor guidance require *evidence of ability to repay*. Here, Vice Chancellor Cook correctly found that Defendants offered no evidence of ability to repay, which Defendants do not challenge on appeal.

4. **DENIED**. There is no "decades of case law" permitting advancement from ERISA plan assets. At most, some cases permit "indemnification" only *after* a fiduciary has been absolved of wrongdoing. This case presents the opposite situation; Vice Chancellor Cook already found Defendants liable for multiple instances of fiduciary misconduct. DOL guidance addresses the exceptions to section 410 of ERISA: payment from third-party sources, such as insurance, and ability to repay. Defendants established grounds for neither.

5. **DENIED**. Vice Chancellor Cook correctly applied the Fund's federal defense to Defendants' counterclaim. This is not a typical advancement dispute. Defendants were not officers or directors of a Delaware company, but instead *ERISA fiduciaries* of a Cayman fund who expressly agreed, to induce qualified ERISA pension funds to provide them tens of millions of dollars of seed money, to manage the Fund as an ERISA qualified plan. Expressly assuming ERISA fiduciary responsibility has consequences, including that ERISA fiduciaries may not be advanced or indemnified from ERISA plan assets. Defendants took what should have been an expedited, summary proceeding, and unnecessarily dragged it out for nearly two years to fight for advancement from ERISA plan assets to defend claims they already lost, all in a strategic bid to obtain and exert leverage over the Fund. Vice Chancellor Cook's well-reasoned decision correctly applied federal circuit-

level ERISA case law to Defendants' advancement counterclaim, and it is respectfully submitted that the ruling below should be affirmed.

STATEMENT OF FACTS[1]

A. THE FUND IS GOVERNED BY ERISA AND DEFENDANTS WERE ERISA FIDUCIARIES

At all relevant times, the Fund was governed by, *inter alia*, the First Amended and Restated Limited Partnership Fund Agreement, dated August 25, 2020 ("LPA"), which is governed by Cayman law. (A00150 § 14.02; A00755-56 ¶ 14). The LPA grants certain oversight authority to a limited partner advisory committee ("LPAC"), comprised of Corbin ERISA Opportunity Fund, Ltd., Corbin Opportunity Fund, L.P., Corbin Private Creditor Manager Fund, L.P., and New York State Nurses Association Pension Plan (collectively, "Corbin") and Gatewood Opportunity Fund (Cayman), L.P. ("Gatewood"). (A00146-48 § 12.01; A00757 ¶ 24).

The Fund was seeded by Corbin and Gatewood. (A00761-62 ¶¶ 35-36). Corbin ERISA Opportunity Fund, Ltd. and New York State Nurses Association Pension Plan are qualified benefit plan investors governed by ERISA's strict fiduciary requirements. (B00038-39 at 38:4-39:11; A00828 ¶ 7). To induce Corbin to invest, Defendants knowingly and expressly accepted their roles as ERISA investment fiduciaries, by executing an ERISA section 3(38) acknowledgment that IGM accepted appointment as an ERISA fiduciary and voluntarily elected "to

[1] Under Rule 14(b)(v), the Fund avoids, where possible, repeating facts cited in Defendants' opening brief.

manage the assets of [the Fund] as ERISA plan assets and as a QPAM….”[2] (A00756 ¶ 18). Despite the risk of personal financial liability for fiduciary breaches, a risk many established plan managers refuse to take on, Defendants knowingly signed the section 3(38) acknowledgment. (A00756 ¶ 18). Defendants were, therefore, at all relevant times, ERISA fiduciaries.

B. DEFENDANTS WERE LAWFULLY REMOVED FROM MANAGING THE FUND

On September 29, 2023, Corbin and Gatewood lawfully removed Invictus GP as the Fund's general partner and terminated the Investment Management Agreement ("IMA") with IGM (collectively, "Removal"). (A00756-57 ¶22). Contemporaneously, Corbin and Gatewood appointed TREO GP as replacement general partner and retained TREO Asset Management LLC ("TREO AM" and, collectively with TREO GP, "TREO") as the Fund's replacement investment manager. (A00756-57 ¶ 22).

After Removal, Defendants knowingly retained possession of over $12 million of the Fund's money, along with substantial information, books and records related to and required to manage the Fund. TREO requested that Defendants return all Fund property over to TREO, as they were legally required to do. In direct contravention of their contractual and ERISA fiduciary duties, however, and spiteful

[2] QPAM stands for "qualified professional asset manager."

after the Removal, Defendants held nearly $10 million of the Fund's money hostage ("Retained Funds"), and wrongfully withheld information, books and records, further violating their duties to the Fund and violated their explicit contractual obligations. (A00769 ¶ 68). Defendants tactfully withheld information and records and the Fund's money while simultaneously claiming TREO was unable to manage the Fund, in a transparent effort to continue exerting control over the Fund and its property notwithstanding the Removal. (B00280 at 20:18-24, "Instead, upon their removal, Defendants seem to have … believed withholding nearly $10 million of the Fund's money would give them leverage in any follow-on dispute.").

C. THE CHANCERY LITIGATION

On October 30, 2023, the Fund sued Defendants in the Court of Chancery, seeking narrow, summary relief to preserve and recover the Retained Funds and information, books and records. (A00208-24 ¶¶ 100-178). Vice Chancellor Cook conducted a trial, and in April 2024 entered judgment for the Fund on the books and records claims. In August 2024, he entered summary judgment in the Fund's favor on the Retained Funds claims. (B00193-214; B00261-86).

The Court of Chancery's prior rulings on the Fund's affirmative claims include substantial factual findings that informed the ERISA ruling that is the subject of this interlocutory appeal. In particular, the court looked to the factual record established in adjudicating those claims, in which the Fund had already proved

Defendants' post-Removal fiduciary misconduct, to support the decision to deny advancement under ERISA.

First, the Court of Chancery entered judgment after trial that Defendants failed to provide information, books and records related to the Fund and its investments, including in breach of section 7 of the IMA between the Fund and IGM. (B00202-09).

Second, the Court of Chancery delivered a summary judgment bench ruling with respect to the Retained Funds. (B00265 at 5:3-6). The ruling was replete with factual findings related to Defendants' wrongful post-Removal conduct and improper litigation strategy that was designed to harm the Fund, including:

- "[a]s set forth in the Court's April 17, 2024, post-trial letter decision, Defendants improperly withheld for months vast quantities of information to which TREO and the Fund were unequivocally and contractually entitled. Indeed, IGM has continued to produce documents to TREO and the Fund over the past several months that should have been produced in September, were promised to be produced in February, were ordered to be produced in April, and again promised to be produced in May." (B00282-83 at 22:22-23:7).

- "In other words, Defendants essentially concede that the governing documents of the Fund and its management relationships make no provision for a terminated manager to refuse to turn over assets of the Fund. Defendants' threadbare explanations for their actions has often left me scratching my head as to why, in a case involving sophisticated parties, this is even a dispute in the first place. I have frequently found myself trying to parse the meaning of arguments like the following from Defendants: '[e]ven if [the Fund] ha[s] right and title [to the Retained Funds], that doesn't mean [Defendants] improperly withheld it.'" (B00275-76 at 15:14-16:2).

- "Instead, upon their removal, Defendants seem to have determined to withhold millions of dollars of the Fund's money because … they believed withholding nearly $10 million of the Fund's money would give them leverage in any follow-on dispute." (B00280 at 20:18-24).

- "By withholding nearly $10 million for as long as they did, Defendants risked depriving the Fund and TREO of the opportunity to invest the funds in alternative investments - and indeed, they may have done exactly that. The Court enforces parties' bargained-for terms and rights. And here, the terminated investment managers tried to get something beyond what they bargained for. The Fund's information, money, and investments transferred, or at least should have transferred but for Defendants' improper withholding, to the Fund and its designated general partner and management investment firm nearly a year ago. Defendants can't identify a legal right to the contrary." (B00282 at 22:1-16).

- "Defendants' abrupt 180 [to hand over the Retained Funds on the precipice of an adverse ruling] resembles Defendants' change in position on the eve of trial in the information rights proceeding. In both the information rights matter and this Retained Funds matter, Defendants have taken questionable positions and fought vigorously to defend those positions up until the eve of trial, or in this case, a few weeks after the summary judgment hearing. Then Defendants drop their arguments at the last minute, purporting to moot the dispute. Yet in the following weeks, it becomes clear that Defendants viewed their concessions to have some strings attached that ultimately do not moot the issue. This type of litigation practice is a drain on both party and court resources. Hardly a strategy that embodies equity. Secondly, the notion that a properly replaced manager may simply withhold monies at its whim, without any contractual basis, seems far removed from reasonable business expectations, much less equity. Frankly, it seems more akin to schoolyard rules, at best." (B00283 at 23:15-24:11).

The court ruled that Defendants had no property interest in or right to retain the Retained Funds, and thus granted summary judgment for the Fund. (B00275-84 at 15:10-24:18).

D. ADVANCEMENT LITIGATION

Directly precipitating the instant dispute, the parties also moved for summary judgment with respect to Defendants' advancement counterclaims.[3] At argument on June 7, 2024, Vice Chancellor Cook asked the parties to address whether he had jurisdiction to consider the Fund's ERISA affirmative defense. (A00888-89 at 42:22-43:1). Despite that the matter had already been removed to federal court and remanded, Defendants' counsel argued that the Court of Chancery lacked jurisdiction to consider the asserted defense to advancement, and suggested that the court rule on advancement without considering the ERISA defense, and instead defer to a federal court in some later litigation to decide whether ERISA prohibits advancement. (A00889 at 43:2-17).

On September 9, 2024, Vice Chancellor Cook delivered a separate bench ruling on advancement. (A00944-82). The court denied the Fund's motion for summary judgment, relying on Delaware law and Delaware's policy in favor of fee advancement. (A00949 at 6:6-17). The court also granted Delano's Cross-Motion, finding that Delano was entitled to advancement. (A00946-47 at 3:23-4:4). The court did not consider the merits of the Fund's ERISA defense at that time, saying instead that the defense was preserved and should be litigated in federal court.

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[3] The Fund initially moved for summary judgment and only Delano cross-moved. The resulting rulings were ultimately extended to all of the Defendants.

(A00979 at 36:10-20). In short, Defendants got exactly what they asked for at the June 7 hearing.

E. DEFENDANTS REVERSE COURSE AND WASTE TIME IN DISTRICT COURT TO AVOID AN ADVERSE ERISA RULING

On September 16, 2024, the Fund moved for reargument, requesting that the court reconsider not deciding the ERISA defense. (A00983). On November 15, 2024, the court again agreed with Defendants that the preserved ERISA defense should be litigated in federal court. (A01036-37; A01038-49; A01050-64).

On November 20, 2024, in compliance with the court's rulings, TREO GP filed a complaint in the District Court to seek a ruling on the preserved ERISA defense, and on November 22, 2024, filed a motion for preliminary injunctive relief. (A01065-88).

On December 10, 2024, Defendants responded in federal court and reversed their position on jurisdiction. Defendants argued that the District Court did *not* have jurisdiction to decide the ERISA defense, despite previously arguing (successfully) that it was the Court of Chancery that lacked jurisdiction and that the ERISA defense had to be litigated in federal court. (B00322-71). Defendants argued that no court had jurisdiction to decide the ERISA defense, in an apparent bid to obtain advancement from the Fund without having to address ERISA. (B00322-71).

On December 11, 2024, Defendants' new jurisdictional position was brought to Vice Chancellor Cook's attention, who granted a stay and confirmed that if the

District Court declined to rule on the ERISA defense, he would take up the matter, agreeing "there should be a ruling by some court on the issue." (B00406-07 at 35:21-36:8; B00423 at 52:14-20). The District Court declined to grant injunctive relief, both because it believed it lacked jurisdiction and because a stay had been granted. (A01146-47 at 50:18-51:23).

The ERISA defense was then briefed and argued to the Court of Chancery, which, on May 23, 2025, ruled that ERISA prohibits advancement from the Fund in this case. The court subsequently certified this interlocutory appeal.

F. DEFENDANTS ARE PROVEN UNABLE TO REPAY

Vice Chancellor Cook also factually determined that Defendants not only failed to provide evidence of ability to repay any advanced fees and costs, but that the only evidence in the record established Defendants' *inability* to repay. (A02158-59). The record included statements in a July defamation complaint filed by IGM, Invictus GP, and Patel ("IGM/Patel Parties") in the Delaware Superior Court (B00246 ¶¶ 111-12; A02158-59), wherein the IGM/Patel Parties asserted that Patel has been told he is "unhireable" and that "[IGM's] enterprise value … is zero,"(B00246 ¶¶ 111-12; A02158-59) as well as prior argument of Delano's counsel expressing doubt that Ms. Delano could "ever pay for the fees and expenses for which she seeks advancement." (A02159). Defendants failed to present any evidence that they had an ability to repay advanced Funds.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY RULED THAT DEFENDANTS' COUNTERCLAIMS FOR ADVANCEMENT ARE PROHIBITED BY ERISA

A. Question Presented

Section 410 of ERISA renders void contractual provisions that permit indemnification of ERISA fiduciaries from ERISA plan assets. Should Defendants, acknowledged ERISA fiduciaries who have already been found to have misappropriated millions of dollars of ERISA plan assets and who have no ability to repay advanced funds, be rewarded by being "advanced" millions of dollars from ERISA plan assets to the detriment of innocent pensioners who invested their retirement savings in the Invictus Fund?

B. Scope of Review

The Court reviews *de novo* a 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 are also reviewed *de novo*. *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 427 (Del. 2010). This Court "may affirm a grant of summary judgment on grounds other than those on which the trial judge relied." *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC,* 55 A.3d 330, 334 (Del. 2012).

C. **<u>Merits of Argument</u>**

The first step in statutory construction is to look at the plain meaning of the statutory language in question. *United States v. Quality Stores, Inc.*, 572 U.S. 141, 155 (2014); *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). If the Court finds the statutory text ambiguous, the Court may look to broader statutory context, purpose, and legislative history. *FCC v. AT&T, Inc.*, 562 U.S. 397, 402-03 (2011); *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

The Court of Chancery correctly ruled that ERISA § 410 bars advancement from the Fund generally, and alternatively that ERISA § 410 bars advancement under the specific facts of this case because Defendants' already proven misconduct implicates their ERISA fiduciary duties *and* because they lack the ability to repay advanced funds. Because the well-reasoned decision of the Court of Chancery is consistent with the plain language of the statute, the ruling below should be affirmed.

i. **<u>ERISA protects participants by strictly regulating fiduciaries</u>**

ERISA protects the interests of participants "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b). ERISA imposes strict and detailed obligations on fiduciaries. This includes statutory, individual fiduciary duties under ERISA § 404, including to administer the plan "solely in the interests of the participants and beneficiaries," "defraying reasonable expenses of administering the plan," and acting "in accordance with the documents and instruments governing the plan" to the extent they are consistent with ERISA. 29 U.S.C. § 1104. There are also (i) co-liability provisions, 29 U.S.C. § 1105, and (ii) a statutorily delineated list of prohibited transactions, which prohibit direct or indirect self-dealing and any other conduct by which a fiduciary may benefit from, or that is adverse to, the plan. 29 U.S.C. § 1106.

To ensure that ERISA fiduciaries comply with their stringent duties to participants, ERISA imposes ***personal*** liability against fiduciaries and requires fiduciaries to make whole any losses suffered by the plan resulting from a breach of fiduciary duty or profits from improper use of plan assets. 29 U.S.C. § 1109(a). ERISA also prohibits exculpatory provisions for fiduciaries, mandating that "any provision in any agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a). There are three statutory exceptions in subsection (b), which authorize purchasing liability insurance for fiduciaries: (i) by plans, if such insurance permits recourse by the insurer directly against the fiduciary; (ii) by fiduciaries, if it was purchased using the fiduciary's own account; or (iii) by employers, if it is to cover the liability of an employee serving in a fiduciary capacity with respect to an employee benefit plan. 29 U.S.C. § 1110(b).

ii. ERISA § 410 voids advancement or indemnification from ERISA plan assets

1. The plain meaning of ERISA § 410 prohibits advancement from ERISA plan assets.

The Court of Chancery's ruling should be affirmed because the plain meaning of section 410 of ERISA renders void the provisions of the LPA purporting to provide advancement from ERISA plan assets. Plain meaning analysis requires the Court to consider the "most common meaning" and "ordinary and natural signification" of the language. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568 (2012). "That a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense." *Id*. The plain and ordinary meaning controls "unless the context in which the word appears indicates that it does [not]." *Id*. at 569.

Here, the plain meaning of the words used in, and grammatical structure of, ERISA § 410 show that Congress prospectively prohibited advancement relating to ERISA fiduciary duties. Section 410 states that "any provision in an agreement or instrument which **purports** to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be **void** as against public policy" unless one of three exceptions in subsection (b) apply. 29 U.S.C. § 1110 (emphasis added).

The Court of Chancery correctly ruled that indemnification and advancement fall within the ambit of section 410 because "such an arrangement would have the same result as an exculpatory clause, in that it would, in effect, relieve the fiduciary of responsibility and liability to the plan by abrogating the plan's right to recovery from the fiduciary for breaches of fiduciary obligations." 29 C.F.R. § 2509.75-4; *see also Koresko*, 646 F. App'x at 244 (citing same).

Courts thus interpret section 410 to mean that ERISA prohibits advancement from plan assets. *Koresko*, 646 F. App'x at 244. In *Koresko*, the district court denied advancement and indemnification under ERISA. On appeal, the defendant argued that the failure to advance defense costs violated his contractual rights, which authorized payment from the plan "in advance, unless it is alleged and until it is conclusively determined that" the defendant was liable for an alleged breach of duty. *Id*. at 243. The Third Circuit rejected the defendant's argument, because any plan provisions that purport to allow the plan itself, through plan assets, to indemnify the fiduciary for defense costs are void under ERISA. *Id*. at 244. "If an ERISA fiduciary writes words in an instrument exonerating itself of fiduciary responsibility, the words, even if agreed upon, are generally without effect." *Id*. (quoting *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1418 (9th Cir. 1997)). The Third Circuit thus held that ERISA assets may not be used to advance fees for ERISA fiduciaries. *Id*.

The court in *Martin v. Walton*, 773 F. Supp. 1524 (S.D. Fla. 1991), reached a similar conclusion as *Koresko* — a complete bar to advancement under ERISA. *Id.* at 1527. "Courts that have addressed the litigation expense issue in factual contexts similar to that presented here have concluded that the advancement or reimbursement of attorneys fees and defense costs are not a properly incurred or reasonable expense of plan administration and, accordingly, are impermissible." *Id.*

As such, when the text of section 410 is read in its entirety, and in a natural ordinary sense, it means that (i) the object of the statute's solicitude are exculpatory provisions and agreements, which undisputedly include advancement and indemnification; (ii) such provisions are reviewed based on the facial terms as agreed by the parties (i.e., those that "purport" to relieve the fiduciary as specified); and (iii) the effect of the law is to automatically render such terms void to the extent they apply to ERISA fiduciary duties (i.e., without other procedural or substantive conditions, such as requiring judicial process or determination to render something void); unless (iv) one of the three statutory exceptions in subsection (b) is applicable. Because the meaning of the text is plain, the Court's inquiry should end there. *In re KB Toys Inc.*, 736 F.3d 247, 251 (3d Cir. 2013).

2. DOL guidance supports the plain meaning.

The Court of Chancery's plain language reading is also supported by guidance issued by the U.S. Department of Labor ("DOL"). Principally, the DOL issued an

"Interpretive Bulletin Relating to Indemnification of Fiduciaries" ("Interpretive Bulletin") in 1975, shortly after ERISA's enactment, providing insight into section 410's interpretation. 29 C.F.R. § 2509.75-4.

The Interpretive Bulletin explains that:

> [t]he Department of Labor interprets this section to permit indemnification agreements which do not relieve a fiduciary of responsibility or liability under part 4 of title I. Indemnification provisions which leave the fiduciary fully responsible and liable, but merely permit ***another party*** to satisfy any liability incurred by the fiduciary in the same manner as insurance purchased under section 410(b)(3), are therefore not void under section 410(a). 29 C.F.R. § 2509.75-4 (emphasis added).

The Interpretive Bulletin enumerates two examples of indemnification provisions that are "therefore not void under section 410(a):"

> **(1)** Indemnification of a plan fiduciary by (a) an employer, any of whose employees are covered by the plan, or an affiliate (as defined in section 407(d)(7) of the Act) of such employer, or (b) an employee organization, any of whose members are covered by the plan; and
> **(2)** Indemnification by a plan fiduciary of the fiduciary's employees who actually perform the fiduciary services. *Id*.

The Interpretive Bulletin concludes that:

> The Department of Labor interprets section 410(a) as rendering void any arrangement for indemnification of a fiduciary of an employee benefit plan ***by the plan***. Such an arrangement would have the same result as an exculpatory clause, in that it would, in effect, relieve the fiduciary of responsibility and liability to the plan by abrogating the plan's right to recovery from the fiduciary for breaches of fiduciary obligations. While indemnification arrangements do not contravene the provisions of section 410(a), parties entering into an indemnification agreement should consider whether the agreement complies with the

> other provisions of part 4 of title I of the Act and with other applicable laws. *Id*. (emphasis added).

On September 9, 1977, the DOL issued Advisory Opinion No. 77-66/67A ("Advisory Opinion") responding to a letter asking whether a certain indemnification provision violated ERISA, including section 410. U.S. Dep't of Labor, Advisory Opinion No. 77-66/67A, 1977 WL 5446, at *1. While the DOL did not find the particular provision objectionable at that time, it was materially distinguishable from the provision here, in that "no payments by the [f]und in advance of a judicial determination are permitted unless the fiduciary submits satisfactory proof that it is financially capable of making any reimbursement ultimately required." *Id*. at *10. The LPA here did not require proof of financial wherewithal, and the factual record established that Defendants are unable to repay any funds actually advanced.

3. Statutory context and legislative history bolster *Koresko*'s plain meaning result.

The statutory framework and legislative history further bolster *Koresko*'s conclusion, correctly relied on by Vice Chancellor Cook, that section 410(a) prohibits advancement. First, nothing in the immediate statutory context of ERISA suggests that Congress meant anything other than what it said in mandating that exculpatory provisions "shall be void as against public policy." 29 U.S.C. § 1110(a). In section 410(b), Congress authorized plans, fiduciaries, or the employers of fiduciaries to purchase fiduciary insurance. 29 U.S.C. § 1110(b). This shows that Congress not only understood the breadth of the prohibition in subsection (a), but also deliberately chose to limit a plan's financial exposure relating to adverse fiduciary liability to only the payment of insurance premiums.

The plain meaning is also consistent with the broader context of ERISA, which utilizes a belt-and-suspenders approach to protecting plan participants. In directly regulating the conduct of fiduciaries, Congress enacted a structure consisting of blanket prohibitions combined with limited enumerated exceptions. For example, section 1106 of ERISA generally prohibits fiduciaries from transacting with the plan, or causing the plan to engage in transactions that directly or indirectly benefit the fiduciary, subject to only limited exceptions in section 1108. *See* 29 U.S.C. §§ 1106 and 1108. In other words, only what Congress expressly permits is allowed.

Furthermore, as compared to the common law of trusts and federal common law, Congress broadened the scope of liability and available remedies to ensure that participants will be made whole in the event of a breach. H.R. Rep. 93-533 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4649-50. For example, Congress extended fiduciary status and liability beyond the "named" fiduciary in a plan to any person exercising discretionary control over the plan or plan assets. 29 U.S.C. § 1002(21)(A). This context indicates that any exemptions to ERISA's protections for participants, such as section 410's limited exceptions to the general prohibition against exculpatory provisions, should be construed narrowly.

Second, outside of ERISA, Congress has used a similar statutory structure in other provisions of federal law relating to fiduciary conduct. *See* 29 U.S.C. § 501 (exculpatory provisions in governing documents of labor organizations "purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."); 5 U.S.C. § 8479 (with respect to fiduciary duties under the Federal Employee Retirement System, "[a]ny provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this subchapter shall be void."). The use of similar prohibitions of exculpatory terms for fiduciaries, both within and outside of ERISA, indicates that (i) Congress chose the language intentionally and (ii) the prohibition applies *ab initio* and is not limited to the context of ERISA enforcement actions.

Congress also knows the difference between "void" and "voidable." Congress has rendered contractual arrangements "void" in numerous provisions across the United States Code in a congruent manner. *See, e.g.*, 15 U.S.C. §§ 77n, 78cc, 80a-46, 1712 (contract terms providing for waiver of various securities and financial services regulatory compliance obligations "shall be void"); 15 U.S.C. § 3609 (any provision in a lease or contract in violation of certain federal housing laws "is against public policy and void"); 16 U.S.C. § 2613 (contract provisions in violation of certain federal energy regulations "shall be null and void"); 33 U.S.C. § 905(b) (under maritime law, when an employee is injured due to the negligence of a vessel, the employee shall have a cause of action directly against a vessel, the employer shall not be liable to the vessel for such damages, and that "any agreements or warranties to the contrary shall be void."). And when Congress wants to create the possibility that a transaction may later become invalid on a case-by-case basis, including through adjudication, it knows how to use the term "voidable" instead. *See*, *e.g.*, 10 U.S.C. § 992 (rendering certain life insurance contracts voidable at the option of a military servicemember); 11 U.S.C. § 548 (rendering certain transactions voidable in bankruptcy cases after court adjudication); and 46 U.S.C. § 31322 (rendering certain maritime mortgage products voidable).

Third, the Court of Chancery's plain meaning interpretation of section 410 is consistent with the applicable DOL Interpretive Bulletin, which distinguishes indemnification provisions based on the source of the assets used to satisfy the liability. 29 C.F.R. § 2509-75-4. In what has been dubbed a "safe harbor" determination, the DOL explained that: "Indemnification provisions which leave the fiduciary fully responsible and liable, but merely permit ***another party*** to satisfy any liability incurred by the fiduciary in the same manner as insurance purchased under section [410(b)(3)], are therefore not void under section [410(a)]." *Id.*

(emphasis added); *see also Perelman v. Perelman*, 919 F. Supp. 2d 512, 523-24 (E.D. Pa. 2013), *aff'd*, 793 F.3d 368 (3d Cir. 2015) (holding that an indemnification clause fell within the safe harbor provided by 29 C.F.R. § 2509.75-4, because it permitted a fiduciary to seek indemnification only from a third party and not from the plan). The Third Circuit in *Koresko* reviewed the Interpretive Bulletin and reached the same conclusion: section 410 renders void "any arrangement for indemnification of a fiduciary of an employee benefit plan ***by the plan***." *Koresko*, 646 F. App'x at 244 (quoting 29 C.F.R. § 2509.75-4) (emphasis added).

Fourth, the legislative history and policy considerations of ERISA are also consistent with the Court of Chancery's decision. Congress explained that ERISA was created due to a lack of "adequate safeguards concerning" the operation of employee retirement plans and therefore ERISA was needed to establish "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." *See* 29 U.S.C. § 1001(a) & (b). The U.S. Supreme Court and the Third Circuit have explained that the primary purpose of ERISA is "to protect … the interests of participants in employee benefit plans and their beneficiaries …." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004); *Am. Orthopedic & Sports Med. v. Independence Blue Cross Blue Shield*, 890 F.3d 445, 449 (3d Cir. 2018). The plain meaning interpretation of section 410 is thus properly understood to prevent ERISA fiduciaries from utilizing participants' retirement funds to defend themselves when adverse to those participants.

Without this protection, former ERISA fiduciaries, such as Defendants here, can attempt to *de facto* immunize themselves from liability by forcing the current ERISA fiduciary into a Sophie's choice. If the current ERISA fiduciary attempts to recover losses from fiduciary misconduct, the former fiduciary can potentially make the cost of the litigation outstrip the financial harm from the misconduct — making a bad position even worse for the victims. But if ERISA fiduciaries are financially incentivized to do nothing because they may be required to pay for both sides of a lawsuit, malicious actors know that they can get away with misconduct as long as they do not cause too much harm. The only substantial deterrent to misconduct remaining would be the risk of DOL enforcement. And if the DOL is the only effective watchdog, limited public resources will have to make up for the lack of private party enforcement. Without that, ERISA's goal to establish a common law to protect the vested pension benefits of participants and beneficiaries would fail.

Ultimately, if Congress intended to permit advancement from plan assets under section 410, it could have included such an exemption with the other exemptions in subsection (b) or not used the term "void" in establishing the effect of the law. *See e.g., Bittner v. United States,* 598 U.S. 85, 94 (2023) (applying the *expressio unius* canon). But Congress chose not to include this additional exemption in subsection (b). Accordingly, there is no reason to deviate from the plain and ordinary meaning of section 410. Defendants' "purported" advancement rights are void *ab initio* and their advancement claims are barred as a matter of law.

iii. Defendants' assert an extra-textual interpretation of ERISA § 410 that has never been established by any court

Defendants' baseline argument is that courts should apply an unwritten limitation into ERISA § 410, such that it only renders void indemnification or advancement provisions in the specific circumstance where an ERISA fiduciary is being sued in federal court under ERISA for violations of their ERISA fiduciary duties. Def. Op. Br. at 17. This argument, however, is completely untethered from the plain meaning of the statutory text, in which Congress prohibited exculpatory provisions *ab initio*, without even mentioning enforcement proceedings. Nothing in the statute or any case has ever said that such a limitation should be read into the statute, and this argument was correctly dismissed by Vice Chancellor Cook. (A02167).

Defendants point to language in the text limiting the prohibition on exculpatory agreements to conduct arising "under this part" (i.e., part 4 of ERISA). 29 U.S.C. § 1110(a); Def. Op. Br. at 17-20. But section 410's language does not contain any procedural requirements or restrictions around when advancement may or may not be permitted. Rather, when read naturally and in the proper context of ERISA, the phrase "under this part" specifies that this comprehensive restriction applies generally with respect to ERISA fiduciary duties, which arise under part 4. In other words, it is the fiduciary's *conduct* that is of concern—not the nature of a proceeding for which advancement or indemnification is sought. By including the phrase "under this part," Congress made clear that the restrictions on exculpation in section 410 applies to fiduciary conduct and not other duties under ERISA. Nor do Defendants grapple with the rest of the statutory text of section 410, which addresses agreements that "purport" to contain impermissible exculpatory terms, which in turn "shall be void as against public policy." *Id*.

Defendants' argument also cannot be squared with the context of ERISA's larger statutory scheme. If Congress meant for the prohibitions on exculpatory provisions to apply only in the context of an ERISA enforcement action, then instead of saying "this part," which refers to fiduciary conduct generally, Congress would have mentioned "part 5," which actually addresses ERISA enforcement actions. Congress could have also said that advancement or indemnification is barred only in ERISA enforcement proceedings or only in proceedings in which breaches of ERISA fiduciary duties are asserted. But Congress said neither.

Instead, Congress drafted a statute that renders certain terms in agreements void *ab initio*. That means those terms are ineffective anytime, anywhere. Most significantly, that prohibits potential advancement or indemnification claims that arise prior to the initial litigation, or, like here, in pre-fiduciary duty litigation commenced in state court to obtain books and records and otherwise enforce a fiduciary's continuing obligations after being removed. After all, advancement and indemnification provisions, including the advancement and indemnification provisions here, are not limited to just the costs incurred after a lawsuit is brought. Defendants' proposed interpretation would create a gaping loophole in the statute.

None of Defendants' authorities support such a radical departure from the statutory text. Def. Op. Br. at 17-20. Defendants cite no authority, and counsel for the Fund has similarly found no authority, limiting section 410 to the specific context of an ERISA enforcement action under part 5. Of course, the historical cases addressing section 410 arose in the context of a part 5 enforcement action, because that is the most typical procedure by which such a dispute would occur. The current procedural context is unique, perhaps because other ERISA fiduciaries were not so brazen following a removal to willfully withhold information, books and records or to unapologetically refuse to return nearly $10 million of ERISA plan assets, thus necessitating emergency injunctive relief before a substantive breach of fiduciary duty lawsuit under part 5 could even be brought.

Defendants also rely upon a case in which a court held that section 410 did not preclude a venue selection clause in an ERISA plan document. Def. Op. Br. at 18-19 (citing *Smith v. AEGON Cos. Pension Plan*, 769 F.3d 922, 931 (6th Cir. 2014)). The *Smith* court held that the plaintiff had waived the argument, but noted in a footnote that it also disagreed on the merits of the argument, because, it explained, statutory venue requirements are within part 5 of ERISA, and are thus separate from any part 4 fiduciary obligations, and furthermore, "a forum or venue selection clause does not attempt to free a fiduciary from its substantive obligations under ERISA." *Id*. at 933, n.9. The *Smith* court did not address whether section 410 only applies in the context of a part 5 enforcement action.

Defendants present no persuasive basis to disturb Vice Chancellor Cook's sound reasoning, which would cripple a vital protection for ERISA beneficiaries in a matter contrary to any reasonable reading of section 410's statutory text. "[C]onstruing statutory language is not merely an exercise in ascertaining the outer limits of a word's definitional possibilities." *AT&T, Inc.*, 562 U.S. at 407. "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (quotation omitted). Under federal law, the rule that courts may not "soften the import of Congress' chosen words even if … the words lead to a harsh outcome is longstanding." *Id*. at 538. This Court should affirm Vice Chancellor Cook's ruling, which properly enforced section 410 as written, and similarly hold that section 410 prohibits advancement from the Fund.

iv. Advancement is particularly offensive in this litigation, where Defendants were directly trying to avoid complying with their fiduciary obligations

In other section 410 advancement cases, fiduciaries sought advancement for defense costs when being sued directly for a breach of their fiduciary duties. Indeed, Defendants argue that Vice Chancellor Cook's ruling should be overturned because this was not the tactic that the Fund took here. Def. Op. Br. at 15-27. On the contrary, section 410 is even more applicable here, because the Fund sought to ***compel compliance with Defendants' fiduciary obligations***, rather than merely seeking damages after the fact.

As noted above, Defendants' obligations to provide information and turnover the Retained Funds were required because of their QPAM ERISA fiduciary status. (A01249; A01912), 29 U.S.C. § 1104(a)(1)(A); *see also Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 23 (2004) (ERISA's "anti-inurement provision" prohibits misappropriation of plan assets); *Sec'y of Labor v. Doyle*, 675 F.3d 187, 201 (3d Cir. 2012); *Laborers' Combined Funds of W. Pa. v. Jennings*, 323 F.R.D. 511, 517-18 (W.D. Pa. 2018). Their refusal to fulfill their obligations constituted a fiduciary breach. (A01250; A01912); 29 U.S.C. § 1104(a)(1)(D); *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty., Inc.*, 710 F.3d 57, 69 (2d Cir. 2013) (a fiduciary's "breach of a contractual obligation in the Plan documents constitutes a breach of their fiduciary duties under §

404(a)(1).”); *see also Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014); and *Smith v. E. I Dupont de Nemours & Co.*, 402 F. Supp. 2d 519, 522 (D. Del. 2005). Any suggestion that restricting the Fund’s access to information about the Fund’s investments or that Defendants’ refusal to turnover the Retained Funds after Removal was anything other than fiduciary misconduct cannot be squared with any semblance of reality.

The specific nature of the summary relief sought by the Fund, however, further exemplifies why advancement *in this case* would have been especially violative of section 410. Defendants’ efforts to prevent the Fund from getting its information, books and records and recovering the Retained Funds were not merely an effort to avoid money damages, but to cause additional harm to the Fund by avoiding complying with their fiduciary obligations in the first place. This was also already addressed by the Court of Chancery. (B00211, “Defendants’ attempt to assert their previously waived defenses reinforces my concern that Defendants are taking positions to delay compliance with their bargained-for contractual obligations.”).

As cited above, section 410 does not merely address provisions that seek to provide relief from “liability,” but also “responsibility” for their fiduciary obligations. 29 U.S.C. § 1110(a) (“any provision in an agreement or instrument which purports to relieve a fiduciary from ***responsibility*** or liability for any responsibility, obligation, or duty under this part shall be void….") (emphasis added). That is exactly what Defendants tried to do from the moment of Removal, through and including when they finally returned the Retained Funds and turned over the information, books and records. They forced the Fund to conduct a trial and seek summary judgment, and forced the court to compel them to act. At every step and turn, Defendants fought to avoid complying with their fiduciary obligations. (B00284 at 23:15-24:11, "the notion that a properly replaced manager may simply withhold monies at its whim, without any contractual basis, seems far removed from reasonable business expectations, much less equity. Frankly, it seems more akin to schoolyard rules, at best.").

All of the legal fees that Defendants incurred in fighting the Fund, therefore, were in furtherance of Defendants' pervasive efforts to evade complying with their fiduciary obligations. Put differently, they were fighting for ***relief from responsibility for their fiduciary responsibilities and obligations***, and the defense costs they incurred supported those efforts. This is, word for word, what ERISA section 410 prohibits.

v. <u>There is nothing unique about the contractual provisions here to mandate a different result than in *Koresko*</u>

Defendants further argue that even if section 410 applied, it would not bar advancement in this case based on the language of section 3.03 of the LPA. Def. Op. Br. at 37. Defendants argue that because the indemnification provision in this case contains a proviso limiting it to "the fullest extent permitted by applicable law," then advancement is permissible in this case, based on alleged distinctions with the *Koresko* case and other supporting authorities. *Id*.

The circular nature of this argument is obvious. Defendants' futile attempt to distinguish *Koresko* amounts to proposing that Vice Chancellor Cook should have disregarded the statutory text and *Koresko's* reasoning based on an issue that was not present in *Koresko* or even relevant to the Third Circuit's reasoning. It is a distinction without a difference. Defendants entirely ignore that *Koresko* turned on the statutory text and the source of funding for advancement; not on the fact that the indemnification provision did not start with a "to the extent permitted by applicable law" proviso. Vice Chancellor Cook did not err in his interpretation of *Koresko*.

In *Koresko*, the Third Circuit held that the indemnification provision violated ERISA because of where the money for indemnification would come from. *Koresko*, 646 F. App'x at 244. Specifically, the Third Circuit held that "[w]e agree with the District Court that this indemnification provision, or Koresko's reliance on this provision to seek plan assets for advancement costs, is in violation of ERISA." *Id*.

(emphasis added). The Court of Chancery correctly applied this straightforward legal principle to deny advancement from plan assets here. The Third Circuit did not, and did not need to, dig into the language of the indemnification agreement to determine its validity; nor did the Court of Chancery. That the ERISA plan would foot the bill for advancement rendered the provision void *ab initio*. *Id*.; (A02161-67). In the instance when *Koresko* did distinguish a previous decision that allowed indemnification, the difference was that the indemnification was being provided by a third party and was not being paid from ERISA assets. *Id*. at 244-45.

The other authorities on which Defendants rely are similarly distinguishable. Those cases generally show that, in similar disputes, courts determine the validity of indemnification provisions based on *who is* responsible for indemnification or whether fiduciary duties were breached. *See Johnson v. Couturier*, 572 F.3d 1067, 1080 (9th Cir. 2009); *Pudela v. Swanson*, 1995 WL 77137, at *2 (N.D. Ill. Feb. 21, 1995); *Packer Eng'g, Inc. v. Kratville*, 965 F.2d 174, 174-75 (7th Cir. 1992); *Walsh v. Reliance Tr. Co.*, 2023 WL 1966921, at *27-28 (D. Ariz. Feb. 13, 2023).

Ultimately, the only case to permit advancement of an ERISA fiduciary using ERISA plan assets is *Moore v. Williams*, a 30 year-old outlier case that no court has followed to permit, let alone compel, advancement from ERISA plan assets. There, the court reviewed an indemnification agreement, and eventually found that "[a]lthough ERISA prohibits, as against public policy, any agreement that purports to relieve a fiduciary of responsibility or liability under ERISA for breach of fiduciary duty, … that prohibition does not prevent advancement of expenses until liability is determined." 902 F. Supp. 957, 966-97 (N.D. Iowa 1995). *Moore* was wrongly decided, as it failed to grapple with the plain meaning of the statutory text and does not even rely on authorities that purport to do so. *Moore* is also distinguishable, because as discussed, Defendants' fiduciary misconduct has already been "determined" in this case, unlike in *Moore*.

Certainly, Vice Chancellor Cook had ample opportunity to review the language of the LPA's indemnification provision closely, and correctly found that it only further supports the Fund's arguments. (A02164-65). Section 3.03 of the LPA provides that indemnification is prohibited if there has been Disabling Conduct or if the fiduciary failed to act in good faith. As discussed above, the Court of Chancery has already issued rulings establishing that Defendants breached their fiduciary duties and breached the Fund's governing documents, both of which establish Disabling Conduct under the LPA. (B00193-214; B00261-86). Therefore, even under the rulings and facts established in this case and based on the language of this indemnification agreement, Defendants are not entitled to advancement.

As such, Vice Chancellor Cook's application of *Koresko* is consistent with the plain and ordinary meaning of section 410, as set forth above, and Defendants' other authorities are inapposite. Defendants' attempted sleight-of-hand is no basis for this Court to disregard the plain and ordinary meaning of the statutory text.

II. ALTERNATIVE – *JOHNSON* STANDARD – LIKELIHOOD OF FIDUCIARY BREACH OR INABILITY TO REPAY

Vice Chancellor Cook also correctly determined that ERISA would preclude advancement here even without the broad prohibition proscribed by *Koresko*, based on Defendants' already proven misconduct and inability to repay advanced funds. (A02165). Outside the Third Circuit, advancement may be enjoined under section 410 if (i) there is a likelihood that a fiduciary duty was breached *or* (ii) the ERISA fiduciary is unable to demonstrate an ability to repay. *Johnson*, 572 F.3d at 1079-81 (finding irreparable harm where "there is a likelihood that Defendants will not have the resources to reimburse [the ERISA plan] if defense costs are advanced"); *see also Sec'y of U.S. Dep't of Labor v. Kavalec*, N.D. Ohio, No. 00968, 2019 (July 14, 2020) (ORDER) at 15 (granting a preliminary injunction barring the fund from paying a current manager advancement and holding that ERISA "prohibits a plan's advancement or payment of a fiduciary's defense costs, particularly when a breach of fiduciary duties has been established or proven likely"). The Court of Chancery's ruling addresses both of these standards, yet tellingly, neither is addressed in Defendants' opening brief.

The Court of Chancery's prior rulings and Defendants' admissions satisfy the standard for prohibiting advancement under *Johnson*. With respect to the likelihood of fiduciary breaches, the court easily concluded that the Defendants' conduct establishes breaches of ERISA fiduciary duties. As the court succinctly pointed out:

> It would, frankly, stretch credulity to the breaking point to argue that defendants' misappropriation of Fund assets by improperly withholding nearly $10 million of the Fund's money and vast quantities of information to which the Fund was unequivocally and contractually entitled would not amount to a breach of defendants' ERISA fiduciary duties. (A02166).

Vice Chancellor Cook's observations were correct. Defendants' breach of the IMA in refusing to provide books and records breached their ERISA fiduciary duties. It is well established that breaching a plan's governing documents violates ERISA fiduciary duties. 29 U.S.C. § 1104(a)(1)(D); *L.I. Head Start Child Dev. Servs*, 710 F.3d at 69 (holding that a fiduciary's "breach of a contractual obligation in the Plan documents constitutes a breach of their fiduciary duties under § 404(a)(1)."); s*ee also Curtiss-Wright Corp.*, 514 U.S. at 83; *Fifth Third Bancorp*, 573 U.S. at 421; *Smith*, 402 F. Supp. 2d at 522. The Court of Chancery's original judgment established that Defendants breached the IMA (a Fund governing document) when it entered judgment for specific performance. (B00193-214). That finding establishes that Defendants breached their ERISA fiduciary duties.

Defendants' misappropriation of the Retained Funds was similarly a breach of their ERISA fiduciary duties. It is also well established that misappropriation of plan assets is an ERISA fiduciary breach. 29 U.S.C. § 1104(a)(1)(A); *see also Raymond B. Yates, M.D., P.C. Profit Sharing Plan*, 541 U.S. at 23 (describing

ERISA's "anti-inurement provision" prohibiting misappropriation of plan assets); *Doyle*, 675 F.3d at 201; *Laborers' Combined Funds*, 323 F.R.D. at 517-18. The Court of Chancery ruled that Defendants had no legal basis to refuse to return the Retained Funds after Removal. (B00275 at 15:10-18). That finding thus also establishes that Defendants breached their ERISA fiduciary duties.

A. Defendants failed to show any ability to repay

Defendants partially quote the DOL's Advisory Opinion to avoid the reality that, if advancement were to be permitted, proof of ability to repay advancement is necessary under ERISA. The indemnification provision in the Advisory Opinion, cited approvingly by Defendants as an exemplary and permissible indemnification provision, expressly states advancement will not be permitted unless there is (1) "receipt of an undertaking by such person to repay such amount plus reasonable interest" if they breach the agreement or their fiduciary duties, **and** (2) "proof satisfactory to the Trustees that such person is financially capable of repaying such amount in the event it is found liable for the amount alleged as damages in the action." *See* Def. Op. Br. at 33.[4] The Ninth Circuit in *Johnson* also looked to ability to pay to determine that injunctive relief denying advancement was appropriate, in

[4] Defendants only partially quote the Advisory Opinion and omit the fact that proof of financial ability to repay is *also* required. *See* Advisory Opinion, 1977 WL 5446, at *8.

connection with the irreparable harm standard. *Johnson*, 572 F.3d at 1081 (noting that "it is enough that Couturier himself alleged that Defendants even now would not be able to pay their legal bills without advancement of funds.").

Despite numerous discovery requests to Defendants to provide information regarding their ability to repay any advanced fees, Defendants refused to provide evidence of their ability to repay and *de facto* admitted that they have no ability to repay. (A02158-59; A02165). The evidence before the court in this regard overwhelmingly proved an inability to repay. In contrast to the absence of any evidence put forward by Defendants, the record included that Patel and IGM filed a complaint in a separate defamation case confirming that they in fact have no money, as Patel is "unhireable" and that "[IGM's] enterprise value … is zero." (B00246 ¶¶ 111-12). Delano's attorney has similarly stated that his firm is unsure if they will ever get paid without advancement. (A02159). Such admissions are consistent with those found sufficient by the Ninth Circuit in *Johnson* to establish without question that any funds actually advanced would result in a complete lost for the Fund and its investors due to Defendants' inability to repay.

III. ALTERNATIVE – PROHIBITED EXTENSION OF CREDIT

Separate from section 410, Defendants' advancement requests must also be denied as requests for extensions of credit from the Fund, which are subject to ERISA sections 406 and 408. These sections provide a separate and independent basis, *in addition to* section 410, by which ERISA prohibits advancement.

As the Defendants themselves openly admit, advancement constitutes an extension of credit. Def. Op. Br. at 29. It also constitutes a transfer of plan assets to or for the benefit of a fiduciary. Such transactions are barred by section 406 of ERISA. 29 U.S.C. § 1106.

Section 406(a), entitled "Prohibited Transactions," provides that "[e]xcept as provided in section 1108 of this title: (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect … (B) lending of money or other extension of credit between the plan and a party in interest; … (D) transfer to, or use by or for the benefit of a party in interest, any assets of the plan…." 29 U.S.C. § 1106(a)(1).

The term "party in interest" is defined to mean, in relevant part: "(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such benefit plan; (B) a person providing services to such plan…." 29 U.S.C. § 1002(14). For the reasons explained above, there is no dispute that Defendants were fiduciaries to the Fund, which they agreed to manage as an ERISA benefit plan, and they also provided services to the Fund, and so were indisputably "parties in interest" under ERISA and as used in ERISA section 406. They remained fiduciaries after Removal, even though they were no longer providing services, because they continued to hold and exert dominion and control over the Retained Funds and the Fund's information, books and records. 29 U.S.C. § 1002(21)(A).

Accordingly, section 406(a)(1)(B) prohibits TREO GP from lending money or extending credit from the Fund to the Defendants. 29 U.S.C. § 1106(a)(1)(B); *see also* Advisory Opinion No. 78-29, 1978 WL 5860, at *1 (section 406(a) prohibits "a direct lending of money or extension of credit between a plan and a party in interest, or any transfer to, or use by or for the benefit of, a party in interest of any assets of the plan."). Similarly, section 406(a)(1)(D) prohibits TREO GP from transferring "any plan assets" to, or for the benefit of, Defendants. 29 U.S.C. § 1106(a)(1)(D). Yet that is exactly what Defendants seek through their advancement requests.

Accordingly, whether by virtue of section 410, as correctly relied upon by Vice Chancellor Cook, or section 406, as an alternative basis, advancement of legal fees from the Fund to Defendants is prohibited by ERISA.

CONCLUSION

For the foregoing reasons, the ruling below should be affirmed.

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