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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, Defendants-Counterclaim Plaintiffs Below, Appellants, v. INVICTUS SPECIAL SITUATIONS MASTER I, L.P., Plaintiff-Counterclaim Defendant Below, Appellee,	No. 283, 2025 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2023-1099-NAC

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

This appeal presents a simple question that the Fund tries hard to obscure: having chosen to sue Defendants in state court under state law, can the Fund now invoke ERISA § 410—a provision that applies only to agreements that exculpate *ERISA* fiduciary liability and responsibility—to strip Defendants of advancement for these state-law proceedings? The answer is no. ERISA § 410 has no application here. And even if it did, the Fund's attempt to transform that federal statutory provision into a sweeping ban on advancement from "plan assets" contradicts the statute's plain text, settled case law, and decades of Department of Labor ("DOL") guidance.

Simply put, ERISA does not bar advancement for state-law claims brought in state court. No court in the fifty years that ERISA has been in force has held otherwise. Section 410(a) concerns only the exculpation of ERISA fiduciaries from ERISA fiduciary liability and responsibility, and is thus inapplicable to the Fund's proceedings in the Court of Chancery, which cannot impose ERISA fiduciary liability or responsibility as a matter of settled law.

Moreover, even if § 410(a) were implicated, it still would pose no obstacle: advancement is neither exculpatory nor a prohibited transaction. The Court of Chancery's contrary ruling is as erroneous as it is unprecedented. The Court should reverse it and enter judgment in Defendants' favor on their counterclaims for advancement.

A. ERISA § 410 does not apply because the Fund's claims do not, and cannot, implicate ERISA fiduciary duties.

The Fund concedes the points necessary for this Court to reverse the Court of Chancery's ruling below. First, ERISA § 410 unambiguously concerns only ERISA fiduciary duties. Second, the Fund does not allege a breach of ERISA fiduciary duty here. Those concessions dictate the outcome: § 410 has no role in this lawsuit.

1. ERISA § 410 concerns only ERISA fiduciary duties.

The Fund agrees that the Court must give effect to the plain language of ERISA § 410, that § 410 is unambiguous, and that it applies to only ERISA fiduciaries and concerns only ERISA fiduciary duties. *See, e.g.*, AB 16 (arguing for application of statute's "plain language"), 18 (describing § 410 as "prohibit[ing] advancement relating to ERISA fiduciary duties"), 20 (conceding § 410 applies to agreements "to the extent they apply to ERISA fiduciary duties"), 29 (arguing § 410 is concerned with "fiduciary conduct"); *see* OB 17-20.[1]

2. The Fund's claims do not implicate ERISA fiduciary duties.

a. The Fund asserted no ERISA claims.

The Fund also agrees that it asserted no claims under ERISA in this action. *See, e.g.*, AB 1 ("The summary relief sought by the Fund did not require the invocation of U.S. federal law."), 2 ("[D]isposition of the Fund's summary claims

[1] "OB" is Appellants' Opening Brief. "AB" is Appellee's Answering Brief.

did not involve federal law" (emphasis omitted)); *see also* OB 21-22. And the Fund never argues that its affirmative defense to Defendants' counterclaims could subject Defendants to ERISA responsibility or liability—presumably because, as Defendants explained, it cannot. *See* OB 23-25.

b. The Fund's state-law claims cannot implicate ERISA fiduciary duties.

Despite those concessions, the Fund insists that its state-law claims sought to compel Defendants' compliance with ERISA fiduciary duties and—even more boldly—that the Vice Chancellor "already found Defendants liable" for ERISA fiduciary breaches. AB 5; *see also id.* at 32-34, 37, 40-41.

The ERISA limbo the Fund proposes—a claim that "is" about ERISA fiduciary duties but "is not" an ERISA claim—is legally impossible. If the Fund's claims truly seek to hold Defendants liable for breaches of ERISA fiduciary duties or to compel ERISA compliance, ERISA completely preempts them, and the Court of Chancery lacks subject-matter jurisdiction over them. *See, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (discussing ERISA's preemptive scope).

ERISA's civil-enforcement provision, § 502(a), is the *only* mechanism available to an ERISA fiduciary to remedy ERISA fiduciary violations, and it can be used *only* in federal court. *See* 29 U.S.C. § 1132(a). Through § 502(a), Congress "completely preempt[ed]" state-law actions over the conduct that ERISA regulates. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). Indeed, the statute's

preemptive force is so powerful, it displaces the well-pleaded complaint rule. *Id.* at 63-64. If a state-law cause of action (1) could have been brought under ERISA § 502(a), and (2) implicates no legal duty "independent" of an ERISA plan, ERISA preempts the claim because the claim is federal in character. *Davila*, 542 U.S. at 209, 210 (explaining ERISA § 502(a) preempts "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy"); *see also Barber v. Unum Life Ins. Co. of Am.*, 383 F.3d 134, 140 (3d Cir. 2004).[2]

As relevant here, ERISA § 502(a)(2) provides an ERISA fiduciary with a cause of action to pursue "appropriate relief" for alleged breaches of ERISA fiduciary duties. 29 U.S.C. § 1132(a)(2). And ERISA § 502(a)(3) provides an ERISA fiduciary with a cause of action to "enjoin any act or practice which violates any provision" of subchapter I of ERISA, which includes ERISA's fiduciary duties, and to obtain "appropriate equitable relief" to redress those violations or enforce ERISA's provisions. *Id.* § 1132(a)(3).

Together, these provisions empower an ERISA fiduciary to pursue alleged ERISA fiduciary breaches in federal court (under federal law) and seek attendant relief, including equitable and injunctive relief, like the relief the Fund now claims it is seeking in this action. *See, e.g.*, *Bixler v. Cent. Penn. Teamsters Health & Welfare*

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[2] The Fund did not dispute this law in response to Defendants' motion to dismiss the Fund's Amended Complaint, which followed the Vice Chancellor's ERISA Ruling. *Compare* AR00083, *with generally* AR00104-50.

Fund, 12 F.3d 1292, 1298-99 (3d Cir. 1993) (explaining § 502(a)(3) is mechanism for obtaining equitable relief to redress ERISA fiduciary duty breaches); *Varity Corp. v. Howe*, 516 U.S. 489, 510 (1996) (similar); *Taylor v. Sheet Metal Workers' Nat'l Pension Fund*, 2025 WL 36348, at *3 (D.N.J. Jan. 3, 2025) (discussing use of § 502(a)(2) to address alleged misuse of plan assets (citing *Mass Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985)); *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 § 502(a)); *Pell v. E.I. DuPont de Nemours & Co. Inc.*, 539 F.3d 292, 306 (3d Cir. 2008) (confirming "ERISA provides for the issuance of injunctions" under § 502(a)).[3]

In short, were the Fund's claims to implicate the ERISA fiduciary duties it now argues they concern, ERISA would preempt those claims, and the Court of Chancery would lack subject matter jurisdiction over them. *See, e.g.*, *Asbestos Workers Local Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935, 937, 943 (Del. 2007) (holding that ERISA completely preempted the fund's claim because the claim "duplicat[ed] or supplement[ed] a civil enforcement remedy available . . . under § 502(a)(3)"); *Menkes v. Prudential Ins. Co. of Am.*, 762 F.3d 285, 296 (3d Cir. 2014) (observing ERISA § 502(a)'s preemptive force "applies to any 'state cause of action

[3] In fact, through a partner of its current investment manager and authorized representative of its current general partner, the Fund has now filed just such a suit in federal district court over the same conduct as is at issue in this one. *See* AR00001.

that provides an alternative remedy to those provided by the ERISA civil enforcement mechanism' because such a cause of action 'conflicts with Congress' clear intent to make the ERISA mechanism exclusive'" (citation omitted)).[4]

The Fund cannot have its cake and eat it too. If the Fund's claims truly concern ERISA fiduciary duties, ERISA strips the Court of Chancery of jurisdiction. If they do not, § 410 is irrelevant. The Fund's effort to invoke ERISA when it helps and disavow ERISA when it hurts is legally impermissible. That argument collapses under its own logic, and § 410 provides no basis to deny advancement.

3. The Fund chose to assert claims to vindicate only state-law rights.

The Fund admits that it understood at the outset that it could have pursued ERISA claims against Defendants, as it is now doing in federal court, but it simply chose not to do so. *See, e.g.*, A02049, 31:4-9 (admitting the Fund chose "to enforce only state law remedies"); *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 23 (Del. Ch. 2009) ("The plaintiff is the master of the complaint, and may choose to proceed under state law alone . . ."). That choice was available to the Fund because, even assuming the Fund contains sufficient ERISA-governed plan assets to trigger ERISA's protections, those legal rights run to only the Fund's ERISA-plan investors.

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[4] This lack of subject matter jurisdiction is neither waivable nor curable. *See, e.g.*, *Gunn v. McKenna*, 116 A.3d 419, 420-421 (Del. 2015); *Chavin v. H.H. Rosen & Co.*, 246 A.2d 921, 922 (Del. 1968); *see also Mansfield v. Swan*, *C & L.M.* 111 U.S. 379, 381-82 (1884).

At all times, the Fund has owed duties to the Fund's non-ERISA plan investors under the parties' governing agreements and state law, not ERISA. Holding the Fund to its choice to bring non-ERISA claims implicating these non-ERISA duties in state court creates no "loophole" in the law, as the Fund now insists. AB 30.

a. The Plan Asset Rule pertains to only ERISA-plan investors.

The Fund's assertion that its assets are "ERISA plan assets" subject to ERISA depends on the Department of Labor's "Plan Asset Rule," 29 C.F.R. § 2510.3-101. AB at 2, 30, 40; *see also, e.g.*, A00847, 35:17-37:16; A01084 ¶¶ 75-76; AR00007, 35 ¶¶ 31, 174-75 (all asserting Fund held sufficient ERISA-governed assets to trigger Plan Asset Rule). But even assuming the DOL's Plan Asset Rule governs the Fund, as the Fund contends, that Rule extends ERISA's reach on behalf of only the Fund's ERISA-plan investors. *See* 29 C.F.R. § 2510.3-101(a)(2) (instructing that "any person who exercises authority or control respecting the management or disposition of such underlying assets . . . *is a fiduciary of the investing plan*" (emphasis added)); *see also, e.g.*, *In re Allianz Glob. Invs. U.S. LLC Alpha Series Litig.*, 2021 WL 4481215, at *4 (S.D.N.Y. Sept. 30, 2021) (characterizing Plan Asset Rule as "establishing that when the assets of an entity, such as the Fund, meet the ERISA 25% Threshold, any person who has control or management responsibilities over the underlying assets is a fiduciary *of the investing plan*" (emphasis added)); *Delphi Beta Fund, LLC v. Univest Bank & Tr. Co.*, 2015 WL 1400838, at *4 (E.D.

Pa. Mar. 27, 2015) (similar).[5] The Rule expressly does not extend ERISA to *non-ERISA plan investors*. *See, e.g.*, 29 C.F.R.§ 2510.3-101(j)(2) (confirming "nothing in [the Rule] imposes fiduciary obligations on [the investing fund's general partner] with respect to [non-ERISA-governed] plan"). Thus, even if the Plan Asset Rule is triggered, a general partner owes two distinct sets of duties: ERISA duties to ERISA-plan investors, and state-law (contractual or fiduciary) duties to non-ERISA-plan investors. *See, e.g.*, *In re Allianz*, 2021 WL 4481215 at *11-12 (recognizing that, under the Rule, only ERISA-plan investors' claims implicate ERISA, while non-ERISA-plan investors' claims remain governed by state law).

This framework refutes the Fund's attempt to treat Defendants' ERISA fiduciary status as an "all or nothing" proposition and reflects a more fundamental premise of ERISA that the Fund ignores—that a person (or entity) may be an ERISA fiduciary for certain purposes but not others. *See, e.g.*, AB 7-8, 43-44 (relying on IGM's having signed an ERISA § 3(38) acknowledgment to deem all Defendants "at all relevant times, [as] ERISA fiduciaries").[6] Specifically, a person may be held liable (or responsible) as a fiduciary under ERISA "only to the extent that he acts in

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[5] Section 11.05 of the Limited Partnership Agreement also recognizes this boundary when it instructs that, under certain circumstances, the Fund's general partner would owe ERISA fiduciary duties only "*to ERISA Partners who are subject to Title I of ERISA*." Bench Ruling (May 23, 2025), 8-9 (quoting LPA § 11.05) (emphasis added).

[6] As noted, the Fund invokes this Section 3(38) acknowledgment for Defendants' supposed ERISA fiduciary status. But only IGM signed that acknowledgment, and it, too, runs in favor of only the ERISA plan investors. *See* A01339.

such a capacity in relation to a plan." *Pegram v. Herdrich*, 530 U.S. 211, 225-26 (2000); *see also, e.g.*, 29 U.S.C. § 1002(21)(A) (defining "fiduciary"); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Consequently, the "threshold question" in deciding whether the Fund's claims implicate ERISA fiduciary duties is whether they concern conduct that Defendants engaged in in a capacity *as* ERISA fiduciaries. *Pegram*, 530 U.S. 225-26.

b. The Fund sued over duties to non-ERISA plan investors.

This distinction explains why the Fund could—and did—bring state-law claims here. Setting aside whether any of the Defendants was ever an ERISA fiduciary as to the Fund's ERISA plan investors, Defendants were *never* ERISA fiduciaries to the Fund's non-ERISA investors, and the duties owed to those investors arose under the governing agreements. *See* AB 8 (conceding Defendants held "contractual and ERISA fiduciary duties"). When the Fund filed this action, it chose to litigate only the alleged breaches of those contractual, non-ERISA duties.

That understanding is consistent with notice-pleading standards, due process, and how the Fund itself characterized its claims in both courts. *See* OB 21-27; *see also, e.g.*, AB 10-11 (quoting earlier judgment addressing "contractual" rights); A01097, 14:22-15:1 (telling District Court it could have pursued ERISA claims but did not); A02049, 31:4-32:24 (same). It is also consistent with black-letter preemption law: if the Fund's claims necessarily implicated ERISA fiduciary duties,

they would have been completely preempted and removable—precisely what the District Court held they were *not*.

This legal framework also eliminates the Fund's dire warnings about "pre-fiduciary duty litigation"—which is not a concept recognized anywhere in the law—and supposed gaps in beneficiary protections. *See* AB 27, 29-31. There is no mystery here: if the Fund wanted ERISA remedies—including injunctive and equitable relief—it could have brought ERISA claims in federal court from the beginning. It chose not to. *See id.* at 32 (conceding "that was not the tactic that the Fund took here"). No policy argument permits the Fund to avoid the consequences of a strategy it deliberately selected of bringing state-law claims in state court.

4. Defendants are entitled to advancement.

Whether the Fund is held to the state-law claims it actually pleaded or those claims are deemed preempted by ERISA, the result is the same: § 410 does not bar advancement. That is because, in either scenario, the Fund's claims cannot impose ERISA fiduciary liability or responsibility—the only circumstance in which § 410 applies. See OB 21-27. Yet the Fund simply ignores those arguments.

B. The Fund's atextual reading of ERISA § 410 does not bar advancement.

Despite conceding ERISA § 410 applies only when "ERISA fiduciary duties" are at issue and arguing that the Court must give § 410 its "plain meaning," the Fund asks the Court to depart from § 410's unambiguous language and hold that it bars

any advancement "from plan assets." AB 18, 19; *see also id.* at 15. The Court should decline that invitation.

1. No authority supports the Fund's "source" rule.

To begin, even the authority the Fund relies on refutes the Fund's proffered rule. As the Fund acknowledges, DOL guidance explains that § 410 is concerned with provisions that "relieve [a] fiduciary of responsibility or liability to the plan by abrogating the plan's right to recovery from the fiduciary *for breaches of fiduciary obligations*." AB 19 (quoting 29 C.F.R. § 2509.75-4) (emphasis added). As the Fund also admits, *Secretary United States Department of Labor v. Koresko*, 646 F. App'x 230 (3d. Cir. 2016), the Fund's primary authority, concerned advancement and indemnification rights *of an ERISA fiduciary* for costs incurred defending *ERISA fiduciary duty* claims. *Id.* So did *Martin v. Walton*, 773 F. Supp. 1524 (S.D. Fla. 1991), on which the Fund also relies. *See id.* at 20. Thus, to the extent these cases can be read to speak to a broader rule forbidding advancement using plan assets regardless of the nature of the underlying dispute, such language is pure dicta.

The Fund attempts to downplay this aspect of *Koresko*, arguing that the Third Circuit rejected the indemnification provision at issue there solely because of "where the money for indemnification would come from." AB 35. But, as Defendants explained in their Opening Brief, that oversimplification cannot be squared with the opinion itself or the authority on which it relies. *See* OB 36-39. Consistent with the

statute, the court's analysis was grounded in the fact that the fiduciary there sought costs he incurred defending *ERISA fiduciary breach claims*, which is precisely why the court rejected the request—because, as the court explained, allowing the costs "would effectively 'abrogat[e] the plan's right to recovery *from the fiduciary for breaches of fiduciary obligations*.'" *Koresko*, 646 F. App'x at 245 (quoting 29 C.F.R. § 2509.75-4) (emphasis added).

The Fund ignores much of the authority Defendants cited in their Opening Brief confirming that courts have repeatedly permitted advancement to ERISA fiduciaries from ERISA plan assets—presumably because there simply is no answer to it. *See, e.g.*, OB 29-30 (citing A01992 (*Cent. States, Se. & Sw. Areas Pension Fund v. Am. Nat'l Bank & Tr. Co.*, 1979 U.S. Dist. LEXIS 8931 (N.D. Ill. Oct. 26, 1979))), 32 (citing *In re Volpitto*, 455 B.R. 273, 294-95 (Bankr. S.D. Ga. 2011)). And the Fund fails to square its proposed "source" rule with DOL guidance expressly approving of advancement (and indemnification) to ERISA fiduciaries *from ERISA plan assets*. *See* OB 33-35 (citing U.S. Dep't of Labor, Advisory Opinion No. 77-66/67A (E.R.I.S.A.), 1977 WL 5446, and seven other DOL opinions); *but see* AB 22 (arguing only that provision in 1977 guidance required proof of ability to reimburse).

More broadly, the Fund ignores that ERISA itself permits a court to award attorneys' fees to a fiduciary who prevails against an ERISA plan fiduciary and the authority Defendants cited reflecting courts' doing just that. *See* OB at 31-33.

Nor does the Fund address the practical havoc its purported rule would wreak, including on the very type of plan that prompted much of that regulatory guidance—a multiemployer plan, whose only source of assets to pay its fiduciaries is ERISA plan assets. *See, e.g.*, *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 605-06 (1993) (explaining in ERISA-governed multiemployer pension plan, multiple employers contribute funds that are "pooled in a general fund available to pay any benefit obligation of the plan"); *Trs. of IAM Nat'l Pension Fund v. Ohio Magnetics, Inc.*, 656 F. Supp. 3d 112 (D.D.C. 2023) (similar); *see also* OB 40-42 (discussing these and other practical considerations).

The Fund's invocation of "the broader context of ERISA" to bridge the gap between the rule it posits and § 410's plain text ignores these realities and the Supreme Court authority Defendants cited reaffirming that ERISA should be read to mean only what it says. AB 23; *but see* OB 15-17. There is no reason for Delaware to become the first state ever to hold that § 410 means something other than what is set forth in its express language.

2. Defendants' advancement rights are not "void."

The Fund's focus on a distinction between "void" and "voidable," and whether litigation *always* needs to exist to trigger ERISA § 410(a), is misplaced. AB 24-25, 28-29. The Court need not engage in an abstract thought exercise about

whether an indemnification or advancement provision may ever be void under ERISA § 410(a), even absent an "ERISA enforcement action." *Id.* at 30. As Defendants explained in their Opening Brief, because the relevant agreement provision permits advancement "[t]o the fullest extent permitted by applicable law," the question before the Court is whether ERISA § 410 voids *the parties'* advancement provision *as applied to the proceedings for which advancement is being sought*. *See* OB 39-40 (citing *Walsh v. Reliance Tr. Co.*, 2023 WL 1966921, at *21 (D. Ariz. Feb. 13, 2023), and *Lawrence v. Potter*, 2018 WL 3625329, at *15 (D. Utah July 30, 2018)).

The Fund responds that this argument is "circular" and that the presence of that language in the parties' indemnification provision, and its absence in the provision at issue in *Koresko*, "is a distinction without a difference." AB 35. But the Fund does not grapple with the case law instructing otherwise, DOL guidance approving of an advancement provision with this language, or Delaware law requiring courts to give effect to the plain language of the parties' agreement. *See generally id.* (failing to distinguish *Walsh*, *Lawrence*, the 1977 DOL guidance, or Delaware law on this basis). Indeed, the Fund admits that courts assessing provisions with similar language have permitted advancement unless "fiduciary duties were breached." *Id.* at 36. Once again, the Fund does not answer this argument because there is no answer to it.

The Fund is also wrong that *Moore v. Williams*, 902 F. Supp. 957, 967 (N.D. Iowa 1995), which considered similar language, is "the only case to permit advancement" of the sort Defendants are requesting. AB 36. As noted above, Defendants cited others in their Opening Brief, but the Fund ignores them. *See supra* at Section I.B.1.

As all of this authority confirms, because the parties' agreement permits advancement only "[t]o the fullest extent permitted by applicable law," ERISA § 410 does not void it. Indeed, the presence of this language squares advancement in this case not only with *Koresko*, but also with DOL guidance and Delaware's long tradition of the generous construction of advancement provisions.

C. Even if ERISA § 410 applied, it would not bar advancement.

1. Advancement is not exculpatory.

ERISA § 410 does not bar the advancement Defendants seek for another reason: advancement is not exculpatory. Nothing about the advancement agreement in this case "purports to relieve" Defendants "from responsibility or liability for any responsibility, obligation, or duty" under ERISA. 29 U.S.C. § 1110(a). Defendants provided ample support for that proposition in their Opening Brief, but the Fund mostly ignores it.

The Fund ignores Defendants' citations to Delaware law, which likens advancement to a "loan" or a "credit" that must be repaid in certain circumstances

and thus does not provide the sort of relief from ERISA fiduciary liability or responsibility that § 410 addresses. OB 29.

The Fund ignores the DOL opinions Defendants cited approving of agreements allowing ERISA fiduciaries to recover, from ERISA plan assets, the "costs or damages, including attorneys' fees, which could be assessed against" them for plan actions as "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." *Id.* at 34-35 (quoting DOL Adv. Op. 93-15A (May 18, 1993) (emphasis added)).

And, as noted above, the Fund ignores, or fails to substantively grapple with, the cases Defendants cited in support of this proposition. *See supra* at Section I.B.2. (observing Fund's ignoring *Volpitto* and *Central States* and failing to distinguish *Walsh* and *Moore*).

Instead, the Fund retreats to the familiar territory of *Koresko*, claiming that § 410 bars all advancement from a fund governed by ERISA, even though the unpublished decision in *Koresko* did not involve state-law claims and involved a materially different advancement provision. AB 35-36. For the reasons discussed above, that reading of *Koresko* is wrong and cannot overcome the plain language of the statute, the case law, and the DOL guidance that the Fund ignores.

2. Defendants do not have to prove an ability to repay to obtain advancement.

The Fund's argument that Defendants should be denied advancement because they did not prove they could repay it lacks merit. *See* AB 14, 41-42. Advancement is not conditioned on proof of ability to repay unless the governing documents require it. *See, e.g.*, *White v. Curo Texas Holdings, LLC*, 2017 WL 1369332, at *7 (Del. Ch. Feb. 21, 2017) (holding that a party cannot insist that a covered person provide "proof of an ability to repay, or even the posting of a secured bond" when the governing documents require only an undertaking (citations omitted)). The governing documents here required only that Defendants provide an executed undertaking, which Defendants did. A00117 (LPA § 3.03(e)); A00944 at 11:23-24 (confirming Ms. Chen Delano's provision of undertaking); A00696 ¶ 54 (admitting receipt of undertakings). Defendants were not required to provide anything more to obtain advancement.

The Fund's assertion that ERISA § 410 nevertheless imposes this requirement is, once again, divorced from that statute's plain language. Section 410 does not by its terms require proof of ability to repay, and the Fund's own cases confirm that the Court must give § 410 its plain meaning. *See* AB 16. Contrary to the Fund's assertion, the DOL has never construed § 410 to require proof of ability to repay to obtain advancement from ERISA funds. *See* AB 41 (citing DOL Opinion No. 77-66 (1977 WL 5446)); *see* OB 41. The DOL's recognition that an indemnification and

advancement provision that included such a requirement did not violate § 410 is a far cry from the DOL's deeming such a requirement "necessary" under ERISA, as the Fund argues. AB 41; *see also* DOL Opinion No. 77-66, 1977 WL 5446 at *12 (opining only that the "provisions in question [did] not contravene" § 410). The Fund could have required Defendants to provide such proof before obtaining advancement by negotiating for that right in the governing documents. It did not.[7]

3. The Fund continues to improperly attempt to litigate whether Defendants are ultimately entitled to indemnity while starving them of advancement.

Despite Delaware law favoring a quick determination on advancement, the Fund has avoided paying advancement owed to Defendants for two years and attempted to starve them of resources necessary to defend against the Fund's aggressive litigation strategy. *See Javice v. JPMorgan Chase Bank, N.A.*, 2023 WL 4561017, *6 (Del. Ch. July 13, 2023) ("Delaware policy favors making it easier to turn the advancement spigot on than to turn it off—creating an intentionally lopsided dynamic favoring advancement claimants."); *Gandhi-Kapoor v. Hone Cap. LLC*, 305 A.3d 707, 713 (Del. Ch. 2023) (instructing that a delay in advancement "prejudices the covered person's ability" to participate in the underlying litigation). The Fund seeks to capitalize on that delay by moving straight to the recoupment

[7] The Fund also is wrong that the Court of Chancery concluded Defendants were unable to repay. *Compare* AB 14, *with* A02158-59 (stating only that Defendants had not "provided evidence of ability to repay").

stage of the proceeding—arguing and implying that although the parties still have claims pending, advancement should not be granted because Defendants were ordered to return books and records and retained funds, which had been held pursuant to a consensual status quo order in an account used by the Fund until returned to the Fund. AB 8-9, 33-34, 40-41.

Such arguments—based on erroneous, nonfinal conclusions reached without advancement—are reserved for the indemnification stage of the proceedings. *Sider v. Glob. Holdings Inc.*, 2019 WL 2501481, at *3 (Del. Ch. June 17, 2019) ("The policy of Delaware favors advancement when it is provided for, with the Company's remedy for improperly advanced fees being recoupment at the indemnification stage."); *Weil v. VEREIT Operating P'ship, L.P.*, 2018 WL 834428, at *6 (Del. Ch. Feb. 13, 2018) (instructing that "disputes as to the ultimate entitlement to retain the advanced funds [are] resolved later at the indemnification stage"); *Trascent Mgmt. Consulting, LLC v. Bouri*, 152 A.3d 108, 112 (Del. 2016). There has been no adjudication of any fiduciary claim—arising under ERISA or otherwise—and the Fund's references to merits determinations, intended to make Defendants appear as bad actors and sway the Court to disregard settled law on advancement, are irrelevant. The Fund may present those arguments later to challenge Defendants' rights to indemnification; they are not before the Court in adjudicating Defendants' rights to advancement.

4. *Johnson v. Couturier* has no application to this case.

The Fund is wrong to suggest that *Johnson v. Couturier*, 572 F.3d 1067, 1080 (9th Cir. 2009), created an alternative "standard" for evaluating advancement under § 410 that involves examining whether (1) there is a likelihood that a fiduciary duty was breached, or (2) the ERISA fiduciary is unable to demonstrate an ability to repay advancement. AB 39. *Johnson* is inapplicable.

Johnson does not set out a test to determine whether advancement should be paid by an ERISA-governed fund in a state-court proceeding. The Ninth Circuit in *Johnson* reviewed a preliminary injunction, and the court applied the factors for determining whether such an injunction was properly issued. *See* 572 F.3d at 1078 (setting out the factors). In doing so, the court had to analyze the likelihood of success on the merits and whether the plaintiff would suffer irreparable harm. Accordingly, the court examined whether there was a likely breach of the ERISA fiduciary duties—claims actually brought in the case—and whether the plaintiff would suffer irreparable harm because, the plaintiff argued, the parties seeking advancement were unable to repay it. *See id.* at 1081. Defendants are not seeking advancement for costs incurred defending ERISA fiduciary-duty claims, and the Court is not deciding Defendants' entitlement to advancement through the lens of a preliminary injunction. *Johnson* is therefore irrelevant.

5. Advancement is not a prohibited transaction.

The Fund cannot escape its contractual obligation to pay advancement by recharacterizing the advancement Defendants seek as a "prohibited transaction" under ERISA § 406. *See* AB 43-44.

First, no Defendant is a "party in interest" as § 406 requires. The Fund's insistence that "Defendants ***were*** fiduciaries to the Fund" in the past, even were it true, would not render Defendants "parties in interest." *Id.* at 43 (emphasis added). To trigger ERISA § 406(a), the person with whom the plan is transacting must qualify as a "party in interest" *at the time of* the challenged transaction. *See, e.g.*, *Sweda v. Univ. of Pa.*, 923 F.3d 320, 339 (3d Cir. 2019) (dismissing § 406(a) claims because party failed to allege defendant "was a party in interest at the time" of the disputed transaction), *abrogated on other grounds by Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022); *D.L. Markham DDS, MSD, Inc. 401(K) Plan v. Variable Annuity Life Ins. Co.*, 88 F.4th 602, 612 (5th Cir. 2023), *cert denied*, 144 S. Ct. 2525 (2024) (same); *Sellers v. Anthem Life Ins. Co.*, 316 F. Supp. 3d 25, 34 (D.D.C. 2018) (same).

There is no dispute that Defendants are not functioning in any fiduciary capacity as to the Fund at this time, and certainly not in connection with receiving the advancement they seek, because they have no "authority or discretionary control" over the Fund, much less as relates to advancement. *Renfro v. Unisys Corp.*, 671 F.3d 314, 321 (3d Cir. 2011); *see also* 29 U.S.C. § 1002(21) (defining ERISA

fiduciaries). Defendants were removed from managing the Fund and replaced in September 2023. *See* AB 8; *see also, e.g.*, *McDermott Food Brokers, Inc. v. Kessler*, 899 F. Supp. 928, 932 (N.D.N.Y. 1995) (finding plaintiff was not ERISA fiduciary as to asserted claims, even assuming it was an ERISA fiduciary at some point prior, because defendants replaced plaintiff and assumed that fiduciary role). That Defendants must ask this Court to order the Fund to pay them advancement shows they have no control over those funds.

Second, even if ERISA § 406(a) applied to the advancement Defendants seek, and it does not, ERISA § 408 would exempt it. Notwithstanding § 406(a), § 408(c)(2) allows a fiduciary to receive "any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan." 29 U.S.C. § 1108(c)(2).

Federal courts and the DOL have recognized that this provision permits payment of reasonable contractual advancement to an ERISA fiduciary without violating § 406. *See, e.g.*, A01997 (*Cent. States*, 1979 U.S. Dist. LEXIS 8931 at *9 (finding "reimbursement for litigation expenses falls within the exemption of § 1108(c)(d).")); *Moore*, 902 F. Supp. at 967 (applying § 408(c)(2) to reject argument that payment of ERISA fiduciary's "legal expenses would be a loan prohibited by ERISA" under §§ 406(a)(1)(B) and (D)); *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907, 913 (8th Cir. 1994) (citing § 408(c)(2) as authorizing plan's

reimbursement of plan fiduciary's litigation expenses under contract); A02037 (DOL Op. No. 77-64, 77-65A, 1977 WL 5445).

Here, the parties' contract establishes that the advancement to which Defendants are entitled is circumscribed by the bounds of reasonableness. A00117 (LPA § 3.03(e)). Thus, even if advancement to Defendants triggered § 406(a), § 408(c)(2) would exempt it from § 406's prohibition.

II. CONCLUSION

For the reasons above and in Defendants' Opening Brief, Defendants respectfully request that this Court reverse the Court of Chancery's ERISA ruling and direct that court to enter judgment in Defendants' favor on their counterclaims for advancement.

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