UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KONSTANTINA DIMOU,

Plaintiff,

v.

THERMO FISHER SCIENTIFIC INC. and MANAGEMENT PENSION COMMITTEE OF THE THERMO FISHER SCIENTIFIC INC. 401(K) RETIREMENT PLAN,

Defendants.

Case No.: 23-CV-1732 TWR (JLB)

ORDER (1) GRANTING IN PART DENYING IN PART PLAINTIFF's REQUEST FOR JUDICIAL NOTICE, AND (2) GRANTING DEFENDANTS' MOTION TO DISMISS WITH LEAVE TO AMEND

(ECF Nos. 19, 32)

Presently before the Court are Defendants Thermo Fisher Scientific Inc. (the "Company") and Management Pension Committee of the Thermo Fisher Scientific Inc. 401(K) Retirement Plan's (the "Committee") Motion to Dismiss Plaintiff's First Amended Complaint ("Mot.," ECF No. 19-1), Plaintiff's Opposition to the Motion ("Opp'n," ECF No. 31), Defendants' Reply in Support of the Motion ("Reply," ECF No. 33), and Plaintiff's Request for Judicial Notice in Support of Opposition to Defendants' Motion to Dismiss ("RJN," ECF No. 32). On April 11, 2024, the Court held a hearing on the Motion. (The "Apr. 11th Hearing," ECF No. 34.) Having reviewed the First Amended Complaint, the Parties' submissions, those materials properly subject to judicial notice or incorporation by reference, and the relevant law, the Court **GRANTS**

IN PART AND DENIES IN PART Plaintiff's Request for Judicial Notice and **GRANTS** Defendants' Motion to Dismiss.

BACKGROUND[1]

Plaintiff Konstantina Dimou is a participant in the Thermo Fisher Scientific Inc. 401(k) Retirement Plan (the "Plan"). (First Amended Complaint ("FAC") ¶ 1, ECF No. 14.) The Plan is a defined contribution retirement plan sponsored by the Company and is subject to the provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq*. ("ERISA"). (*Id*. ¶ 4.) The Company serves as the sponsor and administrator of the Plan and shares the Plan's administration responsibilities with the Committee. (*Id*. ¶¶ 7–8.) Both the Company and Committee are the named fiduciaries of the Plan and exercise discretionary authority and control over the management of the Plan (the "Fiduciary Defendants"). (*Id*. ¶ 9.)

The Plan is maintained under a written document, (*id*. ¶ 11), and is funded by a combination of wage withholdings and Company contributions. (*Id*. ¶ 13.) The Plan participants are immediately vested in their contributions and become fully vested in the Company's contributions after two years of benefit service. (*Id*. ¶ 17.) The wage withholdings and Company contributions become assets of the Plan upon deposit and are held in a trust.[2] (*Id*. ¶¶ 12–13.) Further, any administrative expenses paid by the Plan are shared equally by the Plan participants and charged to the participants' accounts. (*Id*. ¶ 15.) When a participant has a break in benefit service before the full vesting of the Company's matching contributions, the Plan participant forfeits the balance of unvested Company contributions in his/her account, and the Fiduciary Defendants exercise

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[1] For purposes of the Motion to Dismiss, the Court "must accept as true all material allegations in the complaint, as well as any reasonable inferences to be drawn from them," and construe the Plaintiff's operative pleading "in the light most favorable to the plaintiff." *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003).

[2] The trustee, T. Rowe Price Trust Company, is entrusted with distributing the Plan's assets. (FAC ¶ 8.)

discretionary authority over how these forfeitures are reallocated. (*Id.* ¶¶ 18–19.) Accordingly, the Fiduciary Defendants could

> allocate and use all or a portion of the amount of a Participant's benefit forfeited under the Plan either to pay reasonable expenses of the Plan (to the extent not paid by the Employer) or to reduce its Discretionary Contributions, Special Contributions, Matching Contributions and/or other contributions payable under the Plan, for the Plan Year in which the forfeiture occurs or any prior or future Plan Year.

(FAC ¶ 19; Plan Document at 28–29.)

Plaintiff alleges that during the relevant period from 2017 to 2022, the Fiduciary Defendants used the forfeitures in the Plan exclusively for the Company's benefit by offsetting the Company's contribution by $2,789,000 in 2017, $4,623,000 in 2018, $4,142,000 in 2019, $4,285,000 in 2020, $5,518,000 in 2021, and $5,934,000 in 2022. (*Id.* ¶¶ 20–27.) Further, because of the Fiduciary Defendants' reallocation of forfeitures for the Company's benefit, the Company reduced its contributions to the Plan by $2,789,000 in 2017, $4,623,000 in 2018, $4,142,000 in 2019, $4,285,000 in 2020, $5,518,000 in 2021, and $5,934,000 in 2022. (*Id.*) Moreover, the Fiduciary Defendants also failed to use the balance remaining in the forfeiture account after the offset. (*Id.*) Additionally, while the Fiduciary Defendants' reallocation of the forfeitures benefitted the Company by reducing its own contribution expenses, it harmed the Plan because when the Fiduciary Defendants charged the administrative expenses to the participants' accounts it reduced the Plan's assets available for investing. (*Id.* ¶ 28.)

On September 19, 2023, Plaintiff filed a class action complaint under ERISA. (ECF No. 1.) On December 8, 2023, however, she removed her class action allegations and filed the First Amended Complaint, seeking only Plan-wide relief in a representative capacity. (FAC ¶¶ 29–70; FAC Prayer for Relief.) On January 11, 2024, the Fiduciary Defendants moved to dismiss Plaintiff's First Amended Complaint. (*See generally* Mot.) After the April 11th Hearing, the Court ordered Plaintiff to provide additional briefing regarding her constitutional standing to bring this action. ("May 2024 Order," ECF No.

36.) On July 12, 2024, Plaintiff filed her Supplemental Brief, ("Pltf.'s Supp. Br.," ECF No. 39), and on August 1, 2024, the Fiduciary Defendants' filed their Response to Plaintiff's Supplemental Brief. ("Defs.' Supp. Br.," ECF No. 40.)

The Court will first address Plaintiff's constitutional standing to bring this action, followed by Defendants' Motion to Dismiss.

CONSTITUTIONAL STANDING

As the party invoking federal jurisdiction, Plaintiff bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiff is a current participant in the Company's defined contribution plan; therefore, she has statutory standing under ERISA's civil enforcement provisions. *See* 29 U.S.C. §§ 1123(a)(2), 1123(a)(3). To bring an ERISA action, however, Plaintiff must not only have standing under the statute but must also meet the standing requirements of Article III of the U.S. Constitution. *Harris v. Amgen*, 573 F.3d 728, 735 (9th Cir. 2009). To establish Article III standing, a plaintiff must demonstrate (1) "an injury in fact"—i.e., she suffered "an invasion of a legally protected interest" that is "concrete and particularized"—(2) "that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338–39 (2016).

Plaintiff asserts that when the Fiduciary Defendants failed to use the forfeitures to defray the administrative expenses, the expenses got charged to the Plan participants' accounts, resulting in a proportional reduction in Plaintiff's account. (FAC ¶¶ 15–16; Pltf's Supp. Br. at 5.) Accordingly, the Court concludes that Plaintiff suffered a "concrete and particularized" injury traceable to the Fiduciary Defendants' conduct. *See Coppel v. SeaWorld Parks & Ent., Inc.*, No. 3:21-CV-143-RSH-DDL, 2023 WL 2942462, at *6 (S.D. Cal. Mar. 22, 2023) (finding that the plaintiffs established standing because they alleged investment in the plan and plan-wide misconduct).

Finally, Plaintiff must show that judicial relief would likely redress her injury. *Spokeo, Inc.*, 578 U.S. at 338. Plaintiff contends if she prevails, the Court will have

found that the Fiduciary Defendants violated ERISA fiduciary provisions, and any remedial court order would likely direct them to restore the expenses unlawfully deducted from Plaintiff's and other plan participants' accounts. (Pltf's Supp. Br. at 6.) Regarding redressability, the Ninth Circuit in *Harris* held that Section 502(a)(2) claims on a defined contribution plan brought to recover losses occasioned by a breach of fiduciary duty are redressable and meet the constitutional standing requirement. 573 F.3d at 736. The First Circuit similarly reasoned that a defined contribution plan participant's injury is redressable because:

> [t]hese plans are collections of individual accounts, managed for the benefit of the participants and beneficiaries. [ ] [I]f the plaintiffs are ultimately successful in this suit, the fiduciaries should, in accord with their statutory duty of care, strive to allocate any recovery to the affected participants in relation to the impact the fiduciary breaches had on their particular accounts. Thus, the plaintiffs' allegation of fiduciary mismanagement, which at [the pleading] stage in the proceedings we assume to be true, identifies a concrete injury that is redressable by a court and falls within the scope of Article III standing.

Evans v. Akers, 534 F.3d 65, 74–75 (1st Cir. 2008).

Relying on *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123 (9th Cir. 2006), Defendants counter that a judgment in Plaintiff's favor would not force the Company (as a settlor) to increase its contribution to the Plan. (*See* Def. Supp. Br. at 7). In *Glanton*, the defendant was a pharmacy benefits management company that managed the plaintiffs' employers' prescription drug benefit programs. *Id.* at 1124. The plaintiffs alleged that the management company's overcharging on drugs caused the plans to demand higher co-payments from its participants. *Id.* Thus, they argued that if the lawsuit were successful, the plans' drug costs would decrease, and the plans might then reduce co-payments. *Id.* at 1125. The Ninth Circuit held that the plaintiffs' injury was not redressable because nothing would force the employers to reduce co-payments. *Id.* Subsequently, in *Harris*, the Ninth Circuit clarified that *Glanton* applies to cases with a weak factual nexus between a claim and possible

recovery, like the one alleged in *Glanton*, where the plaintiffs did not rely directly on fiduciary recovery but on the assumption that the defendants would voluntarily change co-payment requirements. 573 F.3d at 736.

Here, Plaintiff's theory of liability is premised on the Fiduciary Defendants' decisions concerning forfeiture, and she appears to rely directly on plan recovery. (FAC Prayer for Relief—Plaintiff in her representative capacity requests the Court to "make good to the Plan all losses to the Plan."); *Harris*, 573 F.3d at 735. Thus, the allegations, taken in the light most favorable to Plaintiff, suggest that her injury is redressable. Accordingly, the Court concludes that Plaintiff has standing to bring this action.

Defendants argue, in the alternative, that Plaintiff's injury is not redressable because she has disclaimed any right to individual relief in the First Amended Complaint. (Defs.' Supp. Br. at 8.) As relevant, Plaintiff alleges:

> The Thermo Fisher Plan is the real party in interest whose claims are being brought by Plaintiff, a California resident and current participant in the Plan, in a representative capacity only on behalf of the Plan seeking only Plan-wide relief. Plaintiff is not requesting any individual relief on behalf of herself, nor asserting any class or collective claims on behalf of any other participant or beneficiary.

Plaintiff's purported disclaimer of any "individual relief" does not adversely impact the Court's conclusion above regarding standing. Plaintiff filed this suit under ERISA's civil enforcement Sections 502(a)(2) and (3). (FAC ¶ 2); 29 U.S.C. §§ 1132(a)(2), (3). Section 502(a)(2) "enables the Secretary of Labor or participants, beneficiaries, or fiduciaries of a plan to bring civil actions to seek 'appropriate relief' under Section 409." *Cedeno v. Sasson*, 100 F.4th 386, 397 (2d Cir. 2024) (quoting 29 U.S.C. § 1132(a)(2)). Section 409, in turn, imposes personal liability on plan fiduciaries for losses resulting from a breach of fiduciary duties.[3] 29 U.S.C. § 1109(a). Further,

[3] 29 U.S.C. § 1109(a) provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter

Section 502(a)(3) is a "catchall provision [ ] [that] act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [Section 502] does not elsewhere adequately remedy." *Moyle v. Liberty Mut. Retirement Benefit Plan*, 823 F.3d 948, 959 (9th Cir. 2016) (first, second and third alterations in original) (cleaned up).

Generally, Sections 409(a) and 502(a)(2) "together establish the vehicle for individual plan participants to pursue claims based on a plan fiduciary's breach of its duties pursuant to Section 409(a)." *Cedeno*, 100 F.4th at 397. In the context of a defined-benefit plan, "in *Russell*, the Supreme Court concluded that Section 502(a)(2) claims can only be brought to pursue relief on behalf of a plan and cannot be used as a mechanism to seek individual equitable relief for losses arising from the mismanagement of a plan." *Id*. (citing *Massachusetts Mutal life Ins., Co. v. Russell*, 473 U.S. 134 (1985)). However, in *LaRue v. DeWolff, Boberg & Associates, Inc*., the Supreme Court clarified that "although [Section] 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, the provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a [defined contribution plan] participant's individual account." 552 U.S. 248, 256 (2008).

Although the Court does not have the benefit of Plaintiff's response to Defendants' argument concerning her purported disclaimer because it did not grant her leave to do so, the full text of paragraph 5 of the First Amended Complaint appears to clarify her statutory rights to bring this action in light of *Russell* and *LaRue*. Like in *LaRue*, this case concerns a defined contribution plan. Further, the plaintiff in *LaRue*, like Plaintiff here, brought claims under Sections 502(a)(2) and (3) to "make whole" the plan's assets and for other equitable relief and informed the court that he "'did not wish for the court to award him any money, but … simply wanted the plan to properly reflect that which

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shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

would be his interest in the plan, but for the breach of fiduciary duty.'" 552 U.S. at 251. Here, Plaintiff asserts similar claims and seeks similar relief. (*See* FAC ¶¶ 2; 5; FAC Prayer for Relief). Thus, the Court concludes that the allegations in paragraph 5 do not adversely impact her constitutional standing.

Accordingly, the Court concludes that Plaintiff has sufficiently established Article III standing to bring this action.

MOTION TO DISMISS

I. Legal Standard

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). "A district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Id*. at 1242 (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)).

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (second alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)).

"If a complaint is dismissed for failure to state a claim, leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). "A district court does not err in denying leave to amend where the amendment would be futile." *Id.* (citing *Reddy v. Litton Indus.*, 912 F.2d 291, 296 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991)).

II. Analysis

The Fiduciary Defendants seek to dismiss Plaintiff's following claims: (i) breach of fiduciary duty of loyalty, (ii) breach of fiduciary duty of prudence, (iii) violation of ERISA's anti-inurement provision; (iv) violation of prohibited transactions under 29 U.S.C. § 1106(a)(1), (v) violation of prohibited transactions under 29 U.S.C. § 1106(b)(1), and (vi) failure to monitor fiduciaries. (FAC ¶¶ 34–69); (Mot. at 13–26.) Before turning to the Parties' arguments, the Court first considers Plaintiff's Request for Judicial Notice and the Fiduciary Defendants' request to consider the Plan document under the incorporation-by-reference doctrine.

A. Request for Judicial Notice and Incorporation by Reference

"Judicial notice under Rule 201 permits a court to notice an adjudicative fact if it is 'not subject to reasonable dispute.'" *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (quoting Fed. R. Evid. 201(b)). "A fact is 'not subject to reasonable dispute' if it is 'generally known,' or 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" *Id.* (quoting Fed. R. Evid. 201(b)(1)–(2)). "Accordingly, '[a] court may take judicial notice of matters of public

record without converting a motion to dismiss into a motion for summary judgment.'" *Id.* (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)). "But a court cannot take judicial notice of disputed facts contained in such public records." *Id.* (citing *Lee*, 250 F.3d at 689).

Plaintiff asks the Court to take judicial notice of Note 1 to the Company's Annual Report of Employee Benefit Plan (Form 5500) submitted to the Department of Labor from 2017 through 2022 ("Note 1 to Form 5500") and the Secretary of Labor's Memorandum in Support of Motion for Partial Summary Judgment filed in *Acosta v. Anthony C. Allen, et al.*, Case No. 3:17-CV-784-CHB (W.D. Ky) ("DOL Memorandum"). (*See* RJN Exs. 1–7.) The Fiduciary Defendants do not object to Plaintiff's Request for Judicial Notice.

Because Exhibits 1 through 6 (Note 1 to Forms 5500) are from a reliable public source and the Parties do not dispute the factual content of these Exhibits, the Court **GRANTS** Plaintiff's Request as to Exhibits 1 through 6. *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 n.7 (9th Cir. 2008) (taking judicial notice of SEC filings). The Court, however, does not rely on Exhibit 7 (DOL Memorandum) in deciding this Motion. Accordingly, the Court **DENIES IN PART AS MOOT** Plaintiff's Request for Judicial Notice as to Exhibit 7.

The Fiduciary Defendants also ask the Court to consider the Company's Plan document, amended and restated as of January 2017, under the incorporation-by-reference doctrine. (Mot. at 12; ECF Nos. 19, "Barnhart Decl.;" 19-3, Barnhart Decl. Ex. 1, the "Plan Document.")

"Unlike rule-established judicial notice, incorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself." *Khoja*, 899 F.3d at 1002. "The doctrine prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims." *Id.* (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other grounds as recognized*

in Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 681–82 (9th Cir. 2006)). Consequently, "a defendant may seek to incorporate a document into the complaint 'if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim.'" *Id.* (quoting *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)).

"However, if the document merely creates a defense to the well-pled allegations in the complaint, then that document did not necessarily form the basis of the complaint." *Id.* "Otherwise, defendants could use the doctrine to insert their own version of events into the complaint to defeat otherwise cognizable claims." *Id.* at 1002–03 (citing *Glob. Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 156–57 (2d Cir. 2006); *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 995–96 (S.D. Cal. 2005)). "For this same reason, what inferences a court may draw from an incorporated document should also be approached with caution." *Id.* at 1003. Although "a court 'may assume [an incorporated document's] contents are true for purposes of a motion to dismiss under Rule 12(b)(6),'" *id.* (alteration in original) (quoting *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)), "it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint." *Id.*

Because the Plan Document forms the basis of Plaintiff's claim and she relies on its terms in the First Amended Complaint (FAC ¶¶ 11, 19, 20), the Court **INCORPORATES BY REFERENCE** the terms of the Plan Document into Plaintiff's First Amended Complaint.

B. Breach of Fiduciary Duties: Claims One and Two

"To state a claim for breach of fiduciary duty under ERISA, a plaintiff must allege that (1) the defendant was a fiduciary; (2) the defendant breached a fiduciary duty; and (3) the plaintiff suffered damages." *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1026 (9th Cir. 2021).

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i. ERISA Fiduciary

> Under 29 U.S.C. § 1002(21)(A), a person is a fiduciary for the plan:
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> to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) of this title.

Generally, decisions concerning the design, establishment, or modification of an employee benefit plan are not fiduciary because they do not implicate program management, *Acosta v. Brain*, 910 F.3d 502, 519 (9th Cir. 2018), whereas "common transactions in dealing with a pool of assets [ ] [like] selecting investments, exchanging one instrument or asset for another, and so on" are fiduciary in nature. *Cement & Concrete Workers Dist. Council Pension Fund v. Ulico Cas. Co.*, 387 F. Supp. 2d 175, 187 (E.D.N.Y. 2005), aff'd, 199 F. App'x 29 (2d Cir. 2006) (citing *Harris Trust & Savings Bank v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 28 (2d Cir.2002)). An employer can act as an ERISA fiduciary while also acting as a plan sponsor or settlor. *See Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). However, "ERISA does require that the fiduciary with two hats wear only one at a time and wear the fiduciary hat when making fiduciary decisions." *Id.*

Here, the Company serves as the Plan sponsor and administrator and shares the Plan's administration responsibilities with the Committee. (FAC ¶¶ 7–8.) Under § 9.02 of the Plan Document, the Company, as a sponsor, has the sole responsibility for making Plan contributions. (Plan Document at 60.) By contrast, the Fiduciary Defendants, as administrators, are responsible for the administration of the Plan and exercise discretionary authority and control over the management of the Plan. (FAC ¶ 9.)

Where, as here, a plaintiff challenges the decision of a fiduciary wearing two hats, as a threshold matter a court must determine when the fiduciary has taken off his

"settlor/sponsor hat" and put on his "fiduciary hat." *Acosta*, 910 F.3d at 518; *Pegram*, 530 U.S. at 226. A court may dismiss the complaint as a matter of law if the complaint's allegations do not implicate a fiduciary action. *Tool v. Nat'l Emp. Ben. Servs., Inc.*, 957 F. Supp. 1114, 1119 (N.D. Cal. 1996) (dismissing the complaint for failure to allege fiduciary status).

The Fiduciary Defendants argue that the First Amended Complaint does not implicate a fiduciary decision because Plaintiff has recast the Company's funding decision—a settlor decision—as fiduciary by alleging that the Fiduciary Defendants' decision to reallocate forfeitures in the Plan to offset the contribution necessary to meet the Company's declared contribution amount "somehow induced the Company to reduce Company Contribution to the Plan." (Mot. at 13–15 (cleaned up).)

Plaintiff counters that the Fiduciary Defendants have mischaracterized her allegations, and further asserts that she is not challenging the Company's funding decisions. (Opp'n at 15–16.) Instead, she argues the First Amended Complaint implicates a fiduciary decision because (1) when the Company transfers funds to the Plan, the funds become the Plan's assets, and the Fiduciary Defendants were acting as a fiduciary when deciding how the Plan's assets (including forfeitures) are allocated, (*id*. at 18), and (2) the Fiduciary Defendants also exercised "discretionary authority and discretionary responsibility with respect to the Plan when they "determined to allocate and use forfeitures to offset contributions rather than pay Plan expenses." (*Id*. at 18–19, citing 29 U.S.C. § 1002(21)(A)(iii)).

In *Hutchins v. HP Inc.*, the court considered a defined contribution plan with terms similar to the Plan under consideration here. No. 23-CV-05875-BLF, 2024 WL 3049456, at *1 (N.D. Cal. June 17, 2024). The employer in *Hutchins*, like the Company here, served as the plan sponsor and administrator and shared the plan's administration responsibilities with a benefits committee. *Id*. The plan in *Hutchins*, in addition to providing for the forfeiture of the unvested employer contribution, also authorized various permissible uses of forfeitures—"to reduce employer contributions, to restore

benefits previously forfeited, to pay [p]lan expenses, or for any other permitted use"—like the Plan here. (*Compare id*. (cleaned up), *with* FAC ¶ 19.) The court concluded that, although the decision to include a plan term setting forth various permissible uses for forfeitures is a settlor function, implementing that decision is a fiduciary function. *Id*. at *5. Accordingly, the Court concludes that Plaintiff's claims implicate a fiduciary decision.

ii. Breach of Fiduciary Duties

Under ERISA, a fiduciary must discharge his duties with respect to a plan in accordance with the prudent man standard:

> (1) solely in the interest of the participants and beneficiaries and
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> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
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> (ii) defraying reasonable expenses of administering the plan;
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> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
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> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

29 U.S.C. § 1104(a)(1)(A)–(D). Subsection (A) encapsulates the duty of loyalty, subsection (B) the duty of prudence, subsection (C) the duty to diversify, and subsection (D) imposes on the fiduciary a duty to act in accordance with the plan document. *Hutchins*, 2024 WL 3049456 *5. Further, "[u]nder ERISA the fiduciary duties are found largely in the terms of the plan itself." *Id*. at *6 (first citing *Foltz v. U.S. News & World Rep., Inc.*, 865 F.2d 364, 373 (D.C. Cir. 1989), then citing *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 (2013)).

Under § 3.12 of the Plan here, the Fiduciary Defendants can reallocate the forfeitures to pay the Plan's administrative expenses or reduce the Company's discretionary contributions. (FAC ¶ 19; Plan Document at 28–29.) Thus, when the Company contributed less to the Plan, the Fiduciary Defendants argue that they had to allocate the forfeited funds to ensure that Plan participants received the full amount of their benefits. (Mot. at 18.) Moreover, because the Plan did not contain surplus assets, "it was incumbent on the Fiduciary Defendants to pay the full amount of the benefit to its participants rather than pay the administrative expenses," and "any other decision could have resulted in a funding shortfall harming the Plan participants." (*Id.*) Plaintiff counters that the Fiduciary Defendants should have made a different choice because compliance with the Plan does not excuse their failure to use forfeitures to defray expenses. (Opp'n at 21.)

The *Hutchins* court, in response to an argument similar to Plaintiff's, observed that because ERISA does not require a fiduciary to maximize pecuniary benefits in favor of the plan participants, the fiduciary duty provisions do not create an unqualified duty to pay administrative expenses, especially when the plan document does not create an entitlement to such benefits. 2024 WL 3049456, at *6 ("it is neither disloyal nor imprudent under ERISA to fail to maximize pecuniary benefits") (citing *Foltz*, 865 F.2d at 373). The *Hutchins* court further observed that finding otherwise "would improperly extend ERISA beyond its bounds and would be contrary to the settled understanding of Congress and the Treasury Department regarding defined contribution plans," which historically allowed the use of forfeitures in defined contribution plans to reduce employer contributions. *Id.* The Court finds the reasoning in *Hutchins* persuasive.

Although the *Hutchins* court noted that that neither the existing (26 C.F.R. § 1.401-7(a)) nor the proposed (88 Fed. Reg. 12282-01 (proposed Feb. 27, 2023)) Treasury Regulation forecloses the plaintiff's ERISA claims, these provisions are relevant authorities in evaluating the plausibility of the plaintiff's claims, (*id.* *4), because:

> The Treasury Department and Congress have long understood that forfeitures in defined contribution plans "could be reallocated to the remaining participants under a nondiscriminatory formula, used to reduce future employer contributions, or used to offset administrative expenses of the plan." Use of Forfeitures in Qualified Retirement Plans, 88 Fed. Reg. at 12283. The Conference Report accompanying the Tax Reform Act of 1986 "noted that changes made by [the Act] provided uniform rules regarding the use of forfeitures under any defined contribution plan" under which forfeitures could be reallocated to the accounts of other participants, used to reduce future employer contributions, or to reduce administrative costs. *Id.* (citing H.R. Rep. 99-841, at II-442 (1986)). Consistent with these uniform rules and the historical understanding of defined contribution plans, the Treasury Department has proposed regulations that "would clarify that forfeitures arising in any defined contribution plan" may be used for any one of the following: "(1) to pay administrative expenses, (2) to reduce employer contributions under the plan, or (3) to increase benefits in other participants' accounts in accordance with plan terms."

Hutchins, 2024 WL 3049456, at *6. The *Hutchins* court ultimately concluded that because ERISA's fiduciary provisions neither created a benefit nor abrogated Treasury regulations and settled rules regarding the use of forfeitures in defined contribution plans, the plaintiff's theory of fiduciary liability was too broad to be plausible. *Id.* Here, Plaintiff's fiduciary liability claim, which mirrors the claim asserted in *Hutchins*, is similarly too broad to be plausible. Accordingly, the Court **GRANTS** the Fiduciary Defendants' Motion to Dismiss Plaintiff's first and second causes of action with leave to amend the pleading to allege "more particularized facts or special circumstances" that would justify the relief Plaintiff seeks. *Id.* (citing *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 427–29 (2014)).

C. ERISA Anti-Inurement Provision: Claim Three

Subject to limited exceptions, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1). "[T]he legislative history leaves little

doubt that the anti-inurement rule should be construed to keep as strict a separation as practicable between employers and the funds set aside to benefit employees." *Kwatcher v. Mass. Serv. Emps. Pension Fund*, 879 F.2d 957, 961 (1st Cir. 1989).

Plaintiff argues that between 2017 and 2022, the Company agreed to make a matching contribution equal to 100% of the first 6% of compensation that a participant contributes to the Plan. (Opp'n at 27.) When the Fiduciary Defendants used forfeitures to offset the Company's matching contributions, the Company contributed less than 100% of the first 6% of the compensation contributed to the Plan. (*Id.*) Plaintiff considers this a debt owed to the Plan and argues that the Fiduciary Defendants violated the anti-inurement provision because they used the Plan's assets to forgive the employer's debt to the Plan. (*Id.*)

The Fiduciary Defendants counter that the matching contribution at issue here is not mandatory under the Plan, and thus, cannot be a debt to the Plan. (Reply at 8, citing § 3.04 of the Plan Document.) Second, because Plaintiff's claim is premised on the theory that the Fiduciary Defendants failed to allocate the Plan asset (i.e., forfeitures) differently, she has not alleged that they used the Plan asset for the benefit of someone other than the Plan participants. (*Id.* at 23.)

Generally, "allegations of 'indirect' benefits inuring to an employer are insufficient to state an anti-inurement claim under Section 403(c)(1)." *Krohnengold v. N.Y. Life Ins. Co.*, No. 21-CV-1778 (JMF), 2022 WL 3227812, at *10 (S.D.N.Y. Aug. 10, 2022) (citing *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 88 (2d Cir. 2001)). "Moreover, Section 403(c)(1) claims typically involve allegations of improper 'reversion [or] diversion' of plan assets to the employer." *Id.* (citing, *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1506 (10th Cir. 1995) (alteration in original).

In *Hutchins*, the court disposed of a "debt" theory similar to Plaintiff's and observed that an employer's voluntary reduction in future contribution is not equivalent to a debt. 2024 WL 3049456 *7. Further, the court likened forfeitures in a defined contribution plan to "surplus" assets in a defined-benefit plan because they remain part of

the plan's trust fund, and participants have no entitlement to forfeitures until they are reallocated to individual accounts. 2024 WL 3049456, at *7 (citing 29 U.S.C. § 1002(35)). Because claims under ERISA's anti-inurement provision usually require the reversion of plan assets to the sponsor, the court reasoned, a fiduciary's allocation of forfeitures to reduce the employer's matching contribution does not implicate the anti-inurement provision because the forfeitures "remain part of the [p]lan's trust funds and are used to benefit plan beneficiaries"—i.e., by supplying the employer's matching contribution for *other* plan beneficiaries. *Id*. (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999); *Flanigan*, 242 F.3d at 88; *Maez*, 54 F.3d at 1506) (emphasis added). Like in *Hutchins*, Plaintiff fails to allege removal of plan assets for the benefit of anyone other than the Plan participants. Thus, Plaintiff fails to state a plausible anti-inurement claim. *Id*. Accordingly, the Court **GRANTS** the Fiduciary Defendants' Motion to Dismiss Plaintiff's third cause of action with leave to amend.

D. ERISA Prohibited Transactions: Claims Four and Five

Plaintiff alleges the Fiduciary Defendants engaged in prohibited transactions under 29 U.S.C. §§ 1106(a) (between a plan and a party in interest) and 1106(b) (between a plan and a fiduciary). ERISA regulates the conduct of plan fiduciaries, "placing certain transactions outside the scope of their lawful authority." *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996). To sufficiently allege a claim under 29 U.S.C. §§ 1106(a) and (b), Plaintiff must identify a transaction. *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2004). In *Lockheed*, the Supreme Court explained what constitutes a transaction for purposes of these sections:

> Section 406(a)(1)(D), [29 U.S.C. § 1106(a)(1)(D)] does not in direct terms include the payment of benefits by a plan administrator. And the surrounding provisions suggest that the payment of benefits is in fact not a "transaction" in the sense that Congress used that term in § 406(a). Section 406(a) prohibits fiduciaries from engaging the plan in the "sale," "exchange," or "leasing" of property, 29 U.S.C. § 1106(a)(1)(A); the "lending of money" or "extension of credit," § 1106(a)(1)(B); the "furnishing of goods, services, or facilities," § 1106(a)(1)(C); and the

> "acquisition ... of any employer security or employer real property," § 1106(a)(1)(E), with a party in interest. *See also* § 1108(b) (listing similar types of "transactions"). These are commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length. [ ] What the "transactions" identified in § 406(a) thus have in common is that they generally involve uses of plan assets that are potentially harmful to the plan. [ ] The payment of benefits conditioned on performance by plan participants cannot reasonably be said to share that characteristic.

Id. at 893.

Here, the Parties dispute whether the Fiduciary Defendants' reallocation of the forfeitures within the Plan constitutes a transaction under ERISA. (*Compare* Mot. at 24, *with* Opp'n at 28.) Fiduciary Defendants argue that intra-plan allocation of assets is not a "transaction" under § 1106. (Mot. at 24.) Meanwhile, Plaintiff contends that there was a transaction because the Fiduciary Defendants "'exchanged' forfeitures for diminution of [the Company's] funding obligation." (Opp'n at 28.) Thus, Plaintiff's prohibited transaction claim dovetails with the "debt" theory discussed in the previous section. Plaintiff also argues that she need not identify a transaction to allege a claim under §1106(b).

To sufficiently allege a claim under 29 U.S.C. §§ 1106(a) and (b), Plaintiff must identify a transaction. *Wright*, 360 F.3d at 1101. An intra-plan transaction, like forfeiture reallocation, is unlike a sale or leasing of property to a third-party. *Lockheed*, 517 U.S. at 893. Under similar facts, the *Hutchins* court concluded that reallocating forfeitures in the plan "to provide pension benefits to other employees through use as matching contributions" is not a prohibited transaction. 2024 WL 3049456, at *9 (citing *Lockheed*, 517 U.S. 892–93). Because Plaintiff's allegations do not implicate a prohibited transaction, she fails to state a plausible claim under §§ 1106(a)(1) and (b)(1). Accordingly, the court **GRANTS** the Fiduciary Defendants' Motion to Dismiss Plaintiff's fourth and fifth causes of action with leave to amend.

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E. Failure to Monitor: Claim Six

A failure to monitor claim "is only viable when there is an underlying claim for breach of fiduciary duty." *Partida v. Schenker Inc.*, No. 22-CV-09192-AMO, 2024 WL 1354432, at *9 (N.D. Cal. Mar. 29, 2024). Because Plaintiff has not alleged a plausible claim for breach of fiduciary duty, the Court **GRANTS** the Fiduciary Defendants' Motion to Dismiss Plaintiff's sixth cause of action.

III. Conclusion

In sum, the Court dismisses Plaintiff's claims one through six without prejudice.

CONCLUSION

For the reasons set forth above, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Request for Judicial Notice, **GRANTS** the Fiduciary Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, and **DISMISSES WITHOUT PREJUDICE** Plaintiff's first through sixth causes of action. Further, the Court **GRANTS** Plaintiff leave to file an amended complaint addressing the above-enumerated deficiencies within thirty (30) days of the date this Order is electronically docketed. *If Plaintiff fails timely to file an amended complaint, the Court will dismiss this action without prejudice.*

IT IS SO ORDERED.

Dated: September 19, 2024

Honorable Todd W. Robinson
United States District Judge