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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JAMES MCMANUS,

Plaintiff,

v.

THE CLOROX COMPANY; THE EMPLOYEE BENEFITS COMMITTEE OF THE CLOROX COMPANY 401(k) PLAN; and DOES 1 to 10 inclusive,

Defendants.

Case No. 4:23-CV-05325-YGR

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT PURSUANT TO FED R. CIV. P. 12(B)(1) AND 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: February 20, 2024
Time: 2:00 p.m.
Courtroom: 1 – 4th Floor
Judge: Hon. Yvonne Gonzalez Rogers

Complaint filed: October 18, 2023

TABLE OF CONTENTS

NOTICE OF MOTION AND MOTION 1
STATEMENT OF THE ISSUES TO BE DECIDED 1
MEMORANDUM OF POINTS AND AUTHORITIES 2
I. Introduction 2
II. Background 4
A. The Plan 4
B. The Plaintiff and His Allegations 6
III. Argument 7
A. Plaintiff Lacks Standing to Bring His Claims. 7
B. The Complaint Fails to State a Claim. 10
1. Standard of Review 10
2. Plaintiff Cannot State a Claim for Any Violation of ERISA Where an IRS Regulation Requires the Challenged Conduct. 10
3. Counts I and II Do Not State Claims for Fiduciary Breach. 14
(a) The Complaint Does Not Allege a Plausible Breach of Any Fiduciary Duties. 14
(i) The Court May Not Infer a Breach Where Defendants Followed a Long-Standing, Permitted Practice. 14
(ii) ERISA's Fiduciary Duties Do Not Require Defendants to Increase Plaintiff's Benefits. 14
(b) The Complaint Does Not Adequately Allege that Defendants Acted as Fiduciaries with Respect to the Challenged Conduct. 16
(i) Defendants Acted as Plan Settlors. 17
(ii) Defendants Did Not Exercise Sufficient Discretionary Control Over Plan Administration or Management to Be Fiduciaries. 18
(iii) Forfeited Non-Vested Contributions Are Not Plan Assets. 19
4. Count III Does Not State a Claim for Violation of ERISA's Anti-Inurement Rule. 21
5. Counts IV and V Do Not State Claims for Prohibited Transactions. 22
6. Count VI Does Not State a Claim for a Failure to Monitor Fiduciaries. 24
IV. Conclusion 24

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Intel Corp. Inv. Policy Comm.,
579 F. Supp. 3d 1133 (N.D. Cal. 2022) 7, 10

Arroyo v. Pollock 1400 ECR Owner, LLC,
No. 21-114, 2021 WL 4355332 (N.D. Cal. Sept. 24, 2021) 7-8

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 10

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 10

Black & Decker Disability Plan v. Nord,
538 U.S. 822 (2003) 13

Burns v. Rice,
39 F. Supp. 2d 1350 (M.D. Fla. 1998) 18

Cinelli v. Sec. Pac. Corp. Supplemental Grp. Life Ins. Plan,
No. 93-450, 1993 WL 795226 (N.D. Cal. Nov. 22, 1993) 20

Collins v. Pension & Ins. Comm. of S. Cal. Rock Prods. & Ready Mixed Concrete Ass'ns,
144 F.3d 1279 (9th Cir. 1998) 14, 15

Cotton v. Mass. Mut. Life Ins. Co.,
402 F.3d 1267 (11th Cir. 2005) 16

Cyr v. Reliance Standard Life Ins. Co.,
642 F.3d 1202 (9th Cir. 2011) 18

Depot, Inc. v. Caring for Montanans, Inc.,
915 F.3d 643 (9th Cir. 2019) 19

Fifth Third Bancorp v. Dudenhoeffer,
573 U.S. 409 (2014) 10

First Nat'l Bank of Chi. v. Comptroller,
956 F.2d 1360 (7th Cir. 1992) 11, 12

Gelardi v. Pertec Comput. Corp.,
761 F.2d 1323 (9th Cir. 1985) 18

Glazing Health and Welfare Fund v. Lamek,
896 F.3d 908 (9th Cir. 2018) 21

Henry v. Champlain Enters., Inc.,
445 F.3d 610 (2d Cir. 2006) 14

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 17

In re JDS Uniphase Corp. ERISA Litig.,
No. 03-4743, 2005 WL 1662131 (N.D. Cal. July 14, 2005) 16, 18

Kalda v. Sioux Valley Physician Partners, Inc.,
481 F.3d 639 (8th Cir. 2007) 19, 20

Knudsen v. MetLife Grp., Inc.,
No. 23-426, 2023 WL 4580406 (D.N.J. July 18, 2023) 9

Lierboe v. State Farm Mut. Auto Ins. Co.,
350 F.3d 1018 (9th Cir. 2003) 7

In re LinkedIn ERISA Litig.,
No. 20-5704, 2021 WL 5331448 (N.D. Cal. Nov. 16, 2021) 9, 10

Lockheed Corp. v. Spink,
517 U.S. 882 (1996) 17, 21, 23, 24

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 8

Martin v. Nat'l Bank of Alaska,
828 F. Supp. 1427 (D. Alaska 1992) 10

Pegram v. Herdrich,
530 U.S. 211 (2000) 16, 17

Perez v. Cal. Pac. Bank,
No. 13-3792, 2015 WL 5029452 (N.D. Cal. Aug. 25, 2015) 21

Phillips v. Amoco Oil Co.,
799 F.2d 1464 (11th Cir. 1986) 20

In re Pulaski Highway Express, Inc.,
41 B.R. 305 (Bankr. M.D. Tenn. 1984) 11

Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon,
541 U.S. 1 (2004) 21

Rummel v. Consol. Freightways, Inc.,
No. 91-4168, 1992 WL 486913 (N.D. Cal. Sept. 17, 1992) 14, 21

State St. Bank and Tr. Co. v. Denman Tire Corp.,
240 F.3d 83 (1st Cir. 2001) 21

Thole v. U.S. Bank N.A.,
140 S. Ct. 1615 (2020) 3, 8, 9

Thondukolam v. Corteva, Inc.,
No. 19-3857, 2020 WL 1984304 (N.D. Cal. Apr. 27, 2020) 24

Tool v. Nat'l Empl. Benefit Servs., Inc.,
957 F. Supp. 1114 (N.D. Cal. Nov. 18, 1996) 16

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,
484 U.S. 365 (1988) 13

Useden v. Acker,
947 F.2d 1563 (11th Cir. 1991) 18, 19

In re Wachovia Corp. ERISA Litig.,
No. 09-262, 2010 WL 3081359 (W.D.N.C. Aug. 6, 2010) 18

Wehner v. Genentech, Inc.,
No. 20-6894, 2021 WL 507599 (N.D. Cal. Feb. 9, 2021) 24

Winsor v. Sequoia Benefits & Ins. Servs., LLC,
62 F. 4th 517 (9th Cir. 2023) 8, 9

Wright v. Or. Metallurgical Corp.,
360 F.3d 1090 (9th Cir. 2004) 14, 15, 22, 23, 24

Statutes

15 U.S.C § 78bb(e) 12

26 U.S.C. § 411 11

ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B) 22

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) 23

ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i) 16, 19

ERISA § 102, 29 U.S.C. § 1022 5

ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) 7, 22

ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) 7

ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) 7

ERISA § 406, 29 U.S.C. § 1106 23

ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1) 23

ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A) 7

ERISA § 406(b), 29 U.S.C. § 1106(b) 22, 23

ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1) 7, 24

ERISA § 408(c)(2), 29 U.S.C. § 1108(c)(2) 21

ERISA § 514(d), 29 U.S.C. § 1144(d) 10, 11, 12, 13, 14

Rules and Regulations

Fed. R. Civ. P. 12(b)(1) 1

Fed. R. Civ. P. 12(b)(6) 1, 10

26 C.F.R. § 1.401-7 (1963) 11, 12, 19

Use of Forfeitures in Qualified Retirement Plans, 88 Fed. Reg. 12282 (Feb. 27, 2023) 13

Other Authorities

H.R. No. 99-841 (Conf. Report to Accompany H.R. No. 3838), Volume II (1986) 12

DOL Adv. Op. 79-56A, 1979 WL 7031 (Aug. 9, 1979) 12

DOL Adv. Op. 79-90A, 1979 WL 7027 (Dec. 28, 1979) 11

DOL Adv. Op. 97-23A, 1997 WL 606991 (Sept. 26, 1997) 23

DOL Adv. Op. 2005-03A, 2005 WL 1482886 (Mar. 23, 2005) 23

DOL Adv. Op. No. 2013-01A, 2013 WL 582335 (Feb. 7, 2013) 19

ERISA Technical Release No. 86-1 (1986) 12

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

NOTICE IS HEREBY GIVEN that on February 20, 2024, at 2:00 p.m., or as soon thereafter as counsel may be heard by the above-titled Court, located at 1301 Clay Street, Oakland, CA 94612, Defendants The Clorox Company (together with its affiliates, "Clorox") and the Employee Benefits Committee of the Clorox Company's 401(k) Plan (the "Committee" of the "Plan", and, with Clorox, the "Defendants") will and hereby do move the Court to dismiss the Class Action Complaint (the "Complaint") filed by James McManus ("Plaintiff") pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Defendants respectfully request that the Complaint be dismissed with prejudice under Fed. R. Civ. P. 12(b)(1) because Plaintiff lacks standing to pursue these claims, and under Fed. R. Civ. P. 12(b)(6) because Plaintiff has failed to state a claim. Defendants' motion is based on this Notice of Motion, the Memorandum of Points and Authorities in support thereof, the Request for Judicial Notice, the Declaration of David Rosenberg and exhibits attached thereto, the pleadings and papers on file, and any evidence and argument presented to the Court at the hearing.

STATEMENT OF THE ISSUES TO BE DECIDED

Whether Plaintiff has standing to challenge the Defendants' reallocation of forfeited, non-vested employer contributions to Clorox's other contribution obligations under the Plan where he has received all benefits promised by the Plan and the Plan's terms do not entitle him to those forfeitures.

Whether the Complaint fails to state a claim for any violation of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), where Defendants' conduct is permitted by an Internal Revenue Service ("IRS") regulation.

Whether the Complaint fails to state a claim for breach of ERISA fiduciary duties where Plaintiff has failed to adequately allege that Defendants breached any fiduciary duties, or even that they were fiduciaries, with respect to the challenged conduct.

Whether the Complaint fails to state a claim for breach of ERISA's anti-inurement rule where the rule does not bar Defendants from reallocating forfeitures to other contribution

obligations, and the forfeitures did not inure to Clorox's benefit and were not Plan assets.

Whether the Complaint fails to state a claim under ERISA's prohibited transaction rules where the reallocation of forfeitures, internally within the Plan, did not constitute a covered "transaction", did not involve Defendants acting as fiduciaries, and the forfeitures were not Plan assets.

Whether the Complaint fails to state a claim for breach of ERISA's duty to monitor against Clorox where Plaintiff has not pled an underlying breach of any duties by the Committee.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The Complaint should be dismissed because it effectively seeks (i) to bar the long-standing practice, expressly required by a sixty-year old IRS regulation, of reallocating forfeitures to cover other benefits promised by the Plan and (ii) to require instead that forfeitures be diverted to individual participant accounts to provide additional benefits not promised by the Plan. The Court should reject Plaintiff's novel, and strained, construction of ERISA.

Reallocating forfeitures to other contribution obligations under the same plan to cover other promised benefits has been a commonplace practice at least since the IRS regulation became effective in 1963. This practice has been endorsed since that time by both Congress and the United States Department of Labor ("DOL"), which has enforcement authority over ERISA's fiduciary provisions. Acknowledging as much, the Plan's governing documents explicitly allow this practice. The Complaint—one of five complaints filed against companies that follow this practice in the span of a few weeks[1]—seeks to undo sixty years of lawful conduct.

The Court need not address the merits of Plaintiff's claims at all because he lacks standing to pursue them. Plaintiff does not allege that his individual Plan account received less than was promised under the Plan or that his account suffered losses or lost profits due to the Committee's investment decisions. He acknowledges that the Plan does not require that forfeitures be diverted

[1] *See generally* Compl., *Hutchins v. HP Inc.*, No. 23-5875 (N.D. Cal. Nov. 14, 2023); Compl., *Perez-Cruet v. Qualcomm Inc.*, No. 23-1890 (S.D. Cal. Oct. 16, 2023); Compl., *Rodriguez v. Intuit Inc.*, No. 23-5053 (N.D. Cal. Oct. 2, 2023); Compl., *Dimou v. Thermo Fisher Sci. Inc.*, No. 23-1732 (S.D. Cal. Sept. 19, 2023).

to his individual account to cover expenses that his account otherwise bears, but, rather, expressly permits their reallocation to other contribution obligations. Plaintiff has, therefore, suffered no injury-in-fact. The Court should not rewrite the terms of the Plan to provide him with a windfall of additional benefits that he has no standing to recover. *See Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1619 (2020).

Plaintiff's claims fail on the merits, too. Each claim rests on the argument that Defendants violated ERISA by reallocating forfeitures to other contribution obligations. This premise fails to state a claim because the IRS regulation requires that forfeitures be reallocated as Defendants did. While the IRS regulation also permits the application of forfeitures to plan expenses generally (such as the Plan expenses Clorox otherwise pays), it does not require that application. And it prohibits Plaintiff from seeking, as he does here, an entitlement to the application of forfeitures to increase his benefits by having his personal account's administrative expenses reduced those forfeitures, where such an entitlement is not set forth in the Plan Document. Nothing in ERISA purports to override this regulation. Indeed, ERISA specifically provides that it does not supersede or impair other federal law.

Each of Plaintiff's claims fails for individual reasons as well. His breach of fiduciary duty claims (Counts I and II) fail because he cannot plausibly plead a breach where Defendants merely reallocated forfeitures as required by the IRS regulation and permitted by the Plan. They also fail because he cannot establish that Defendants were acting as relevant fiduciaries in doing so—at most, in declining to provide additional benefits through reduced individual expense payments, they acted as settlors. His claim alleging breach of ERISA's anti-inurement rule (Count III) fails because that rule does not bar Defendants from reallocating forfeitures to other contribution obligations internally within the same plan, and because forfeitures did not inure to Clorox's benefit and were not Plan assets. His prohibited transaction claims (Counts IV and V) fail because reallocating forfeitures internally within the same plan does not constitute a covered "transaction", Defendants were not acting as fiduciaries in reallocating forfeitures, and forfeitures were not Plan assets. Finally, his breach of the duty to monitor other fiduciaries claim (Count VI) fails because

it is derivative of Plaintiff's other claims.

For these and the other reasons set forth below, the Complaint should be dismissed.

II. Background

A. The Plan

Clorox sponsors the Plan to provide retirement benefits to its eligible employees.[2] The Plan makes available investment options among which Plan participants may choose to invest the components of their Plan accounts.[3] The Plan is comprised of two components: a 401(k) component and a non-elective employer contribution component.[4] The Plan's 401(k) component contains each participants' pre-tax 401(k), Roth, and after-tax contributions, plus a company match that begins after a participant has completed one year of service with Clorox and is equal to up to 4% of a participant's eligible compensation for that year, and earnings on these amounts.[5] Participants are always 100% vested in the 401(k) component of their Plan account, and therefore such amounts cannot be and are not forfeited.[6]

Eligible employees are automatically enrolled in the Plan's non-elective employer contribution component after completing one year of service with Clorox.[7] This Plan component is funded solely by Clorox through non-elective contributions and otherwise includes only any earnings on those contributions.[8] At the end of each calendar year, Clorox makes a non-elective contribution to the account of each eligible employee enrolled in that component equal to 6% of the individual's eligible compensation, which is in addition to any matching contributions made

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[2] Plan Summary Plan Description ("SPD") at MTD099, Rosenberg Decl. Ex. 2.

[3] *Id.* at MTD114–16.

[4] *Id.* at MTD099.

[5] *Id.* at MTD101–04.

[6] Plan Amendment and Restatement effective January 1, 2017 ("Plan Document") at MTD029 (§ 8.01), Rosenberg Decl. Ex. 1; *see also* Plan SPD at MTD104–05, Rosenberg Decl. Ex. 2. In addition to Clorox's non-elective employer contribution, the only other Plan funding subject to forfeiture are value sharing contributions, which were only made prior to 2011. Plan Document at MTD024–25, 29 (§§ 5.15, 8.01), Rosenberg Decl. Ex. 1.

[7] Plan Document at MTD022 (§ 5.06(b)), Rosenberg Decl. Ex. 1.

[8] Plan SPD at MTD104, Rosenberg Decl. Ex. 2.

by Clorox.[9] Plan participants do not vest in non-elective employer contributions immediately; rather, as the Plan Document sets forth, they vest in those contributions pursuant to a set schedule that is based on their years of service at Clorox.[10] Plan participants also become fully vested in these amounts (i) when they reach either 60 or 62 years of age (generally depending on when they were first employed by Clorox), (ii) if they die while employed by Clorox, or (iii) if they leave employment at Clorox due to a disability.[11]

The Plan Document further provides that, in certain circumstances, the non-vested portions of the non-elective employer contribution component of a participant's Plan account can be forfeited and removed from the account.[12] Specifically, the Plan Document provides that any non-vested contributions "may be forfeited after 5 years" if the individual is not fully vested and has not received a distribution, and "will" be forfeited if an individual is not fully vested and leaves Clorox's employment (i) without any vested interest in his account or (ii) receives a distribution of the vested portion of his account.[13] The Plan Document states that "[f]orfeited amounts will be used, as determined by the Committee in its sole discretion, to pay Plan expenses, to reduce contributions to the Plan and to restore forfeitures."[14] As to the latter provision, the Plan Document provides expressly that, if a previously-employed participant resumes her status as an eligible employee within five years, any amounts previously forfeited from her account will be restored to her account, and that the funds for such restoration "will be drawn first" from forfeitures.[15] No provision of the Plan—and Plaintiff points to none—entitles any participant to contributions made to or forfeited by other participants.

The Plan's SPD—which by statute is provided to Plan participants (ERISA § 102, 29 U.S.C. § 1022)—similarly discloses that Clorox's non-elective employer contributions do not vest

[9] Plan Document MTD021–22 (§ 5.06), Rosenberg Decl. Ex. 1.

[10] *Id.* at MTD029 (§ 8.01(b)).

[11] Plan Document at MTD029–30 (§ 8.01(c)).

[12] *Id.* at MTD030 (§ 8.02(a)).

[13] *Id.*

[14] *Id.* (§ 8.02(a)(i)).

[15] *Id.* (§ 8.02(c)).

immediately, but rather generally vest pursuant to a set schedule, and that the non-vested amounts can be forfeited in the same ways as described in the Plan's governing document.[16] It further discloses that forfeitures "may", "at the discretion of the [Committee]", "be used to pay Plan expenses, to reduce contributions to the Plan, and/or to restore forfeitures to the accounts of returning employees."[17]

With regard to expenses, the Plan Document states that: "[a]ll proper expenses incurred in administering the Plan will be paid from the [Plan's] Trust if not paid by [Clorox]. . . . If expenses are initially paid by [Clorox], [Clorox] may be reimbursed from the [Plan's] Trust."[18] As the Plan discloses in its annual filings with the IRS and DOL, some Plan expenses are paid by Clorox and others are deducted from participants' Plan accounts: "[Clorox] pays all administrative expenses except for certain investment fees and loan fees, which are deducted from the affected participant's account. Quarterly recordkeeping fees are also deducted from participants' accounts."[19]

As permitted by the Plan Document (and required by the IRS regulation), the Committee has reallocated a portion of forfeitures to meet other Plan contribution obligations, and chosen not to divert forfeitures to participants' individual accounts to pay those expenses deducted from their accounts. Forfeitures that were not used to reduce future contributions to the Plan can be used as required under Plan Section 8.02(c) to restore accounts of previously terminated participants.[20]

B. The Plaintiff and His Allegations

Plaintiff is a former Clorox employee and a current Plan participant. Compl. ¶ 9. He does not allege that Clorox failed to make any required contribution to his individual Plan account, that

[16] Plan SPD at MTD104–05, Rosenberg Decl. Ex. 2.

[17] *Id.* at MTD105.

[18] Plan Document at MTD045 (§ 15.04), Rosenberg Decl. Ex. 1.

[19] 2022 Plan 5500 at MTD155, Rosenberg Decl. Ex. 3; *see also* 2021 Plan Form 5500 at MTD198, Rosenberg Decl. Ex. 4; 2020 Plan Form 5500 at MTD238, Rosenberg Decl. Ex. 5; 2019 Plan Form 5500 at MTD278, Rosenberg Decl. Ex. 6; 2018 Plan Form 5500 at MTD320, Rosenberg Decl. Ex. 7; 2017 Plan Form 5500 at MTD359, Rosenberg Decl. Ex. 8.

[20] *See, e.g.*, 2022 Plan 5500 at MTD154, Rosenberg Decl. Ex. 3 (disclosing the amounts of forfeitures used to reduce Clorox's contributions).

his individual Plan account received less than was promised under the Plan, or that his account suffered investment losses or lost profits due to any investment decisions pertaining to his account. Rather, he alleges that Defendants had "discretion" to use "forfeited nonvested [Plan] accounts" of former participants "to pay the Plan's expenses or reduce [Clorox's] contributions to the Plan," and that Defendants elected the latter. Compl. ¶¶ 9, 23–25.

Plaintiff alleges that Defendants violated ERISA by failing to divert those forfeitures to his and other individuals' Plan accounts to pay Plan expenses. In particular, Counts I and II allege that this conduct violated ERISA's duties of loyalty and prudence, ERISA §§ 404(a)(1)(A)–(B), 29 U.S.C. §§ 1104(a)(1)(A)–(B) (Compl. ¶¶ 38–50); Count III alleges that it violated ERISA's anti-inurement rule, ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) (*id.* ¶¶ 51–55); and Counts IV and V allege that it constituted prohibited transactions under ERISA §§ 406(a)(1)(A), (D), and (b)(1), 29 U.S.C. §§ 1106(a)(1)(A), (D), and (b)(1). *Id.* ¶¶ 56–66. Count VI alleges that Clorox "breached" a duty to monitor "the Committee by, among other things, failing to monitor the Committee's management and use of forfeited funds in the Plan." *Id.* ¶¶ 67–73. Plaintiff seeks to represent a class of "[a]ll participants and beneficiaries of the [Plan] from October 18, 2017 through the date of judgment, excluding Defendants and members of the Committee." *Id.* ¶ 34.

III. Argument

A. Plaintiff Lacks Standing to Bring His Claims.

Plaintiff fails to meet the threshold test of standing to invoke the Court's jurisdiction. He cannot establish any injury in fact because his suit seeks amounts to which he is not entitled under the Plan. Therefore, the Complaint should be dismissed.

To bring ERISA claims, a plaintiff must have Article III constitutional standing. *See Anderson v. Intel Corp. Inv. Policy Comm.*, 579 F. Supp. 3d 1133, 1161 (N.D. Cal. 2022) (granting motion to dismiss claims due to plaintiffs' failure to establish constitutional standing), *appeal docketed* No. 22-16268 (9th Cir. Aug. 22, 2022). "[S]tanding is the threshold issue in any suit." *Lierboe v. State Farm Mut. Auto Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) (internal quotation marks omitted). "To bring a claim in federal court, a plaintiff has the burden of establishing Article III standing." *Arroyo v. Pollock 1400 ECR Owner, LLC*, No. 21-114, 2021

WL 4355332, at *2 (N.D. Cal. Sept. 24, 2021). A plaintiff must demonstrate that he has (1) "suffered an injury in fact[,]" (2) "there [is] a causal connection between the injury and the conduct complained of" and (3) that it is "likely . . . that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

Plaintiff does not allege that Clorox failed to make any required contribution to his individual Plan account or that his account has suffered any financial harm. He concedes that the Plan does not require that forfeitures be used to pay Plan expenses, let alone specific Plan expenses that he claims might have been borne by his account. And he admits the Plan allowed Defendants to decide, at least, whether to apply the amounts generally to Plan expenses (which themselves are required to be paid by Clorox if not paid from the Plan's trust) or to reduce Clorox's contributions. Compl. ¶ 23. Nonetheless, Plaintiff claims an individual entitlement to forfeitures, asserting that Defendants were required to use them to defray those expenses borne by his individual account, in effect providing him benefits beyond those to which he was entitled under the terms of the Plan.[21] *Id.* ¶¶ 9, 24–25.

However, Plaintiff has "no concrete stake in [this] lawsuit," and therefore has not suffered an injury in fact, because he has received all of the benefits he was promised under the Plan and sues instead to receive additional amounts. *Thole*, 140 S. Ct. at 1619. In *Thole*, the Supreme Court affirmed dismissal of pension plan participants' claims where they had received all benefits to which they were entitled under their plan and were suing to recover additional amounts not promised under the plan. *Id.* The Ninth Circuit recently followed *Thole* in holding that welfare plan participants also lack standing where they have received all benefits to which they were entitled under their plan. *Winsor v. Sequoia Benefits & Ins. Servs., LLC*, 62 F. 4th 517, 528 (9th Cir. 2023).

Plaintiff additionally lacks standing under *Thole* and *Winsor* because he cannot show that his alleged harm would be redressed by a favorable decision. Plaintiff seeks an order requiring,

[21] Necessarily, Plaintiff is only complaining about expenses borne by his and absent class members' own accounts. He clearly has no standing to sue over any supposed failure to use forfeitures to defray administrative expenses that the Company was otherwise obligated to pay.

among other things, that Defendants restore losses and make disgorgement to the Plan in the amount of the forfeitures used to reduce Clorox's contributions. *See* Compl. ¶ 25 & Prayer for Relief. But even if those amounts are paid back to the Plan, the Plan Document would not require them to be used to pay expenses deducted from Plaintiff's individual Plan account. Rather, the Plan simply permits Clorox to allocate such funds "to pay Plan expenses", but it does not specify which Plan expenses can be paid by forfeitures. *Supra* pp. 5–6. Thus, even if he "were to win this lawsuit," Plaintiff's benefits may not change because even if the Committee did not use forfeited amounts (as permitted by the Plan) to reduce contributions to the Plan, it could have used such amounts to pay general Plan expenses otherwise paid by Clorox (and not borne by participant accounts) or to restore other participants' forfeitures. *Thole*, 140 S. Ct. at 1619; *Winsor*, 62 F.4th at 525 (plaintiff lacked standing where it was not "likely . . . that a favorable decision will redress [the plaintiff's] injuries"). As one court that followed *Thole* held, plaintiffs lacked standing because, even if they "were to succeed in their ERISA claims and any disgorged funds are deposited back into the [p]lan", what would then happen to the funds "remains conjecture." *Knudsen v. MetLife Grp., Inc.*, No. 23-426, 2023 WL 4580406, at *5 (D.N.J. July 18, 2023), *appeal docketed*, No. 23-426 (3d Cir. Aug. 22, 2023).

Thole and *Winsor* are applicable here. "[D]istrict courts across the country" have applied *Thole* to defined contribution plans, like the one here, where plaintiffs do not show any injury to their plan accounts. *In re LinkedIn ERISA Litig.*, No. 20-5704, 2021 WL 5331448, at *4 (N.D. Cal. Nov. 16, 2021) (citing cases). Although *Thole* distinguished defined contribution plans from defined benefit plans, its distinction pertained to the fact that defined contribution plan "benefits can turn on the plan fiduciaries' particular investment decisions" and "on how well the trust is managed." *Thole*, 140 S. Ct. at 1618–19. This distinction is irrelevant here, where Plaintiff does not allege poor investment decisions by Defendants or that the Plan's trust was mismanaged, but rather alleges only that his individual account should have received more benefits than those set forth in the Plan Document. Indeed, in other cases where the distinctions between defined benefit and defined contribution plans identified in *Thole* were irrelevant, Northern District of California courts have rejected arguments that *Thole* was limited to defined benefit plans and applied its

holdings to find that defined contribution plan participants like Plaintiff lacked standing. *E.g.*, *Anderson*, 579 F. Supp. 3d at 1161 (dismissing claims challenging allegedly defective disclosures because plaintiff could not allege harm); *In re LinkedIn ERISA Litig.*, 2021 WL 5331448, at *4 (dismissing claims alleging "plan-wide mismanagement" where plaintiffs could not "plead injury to their own plan account[s]").

For these reasons, the Complaint should be dismissed because Plaintiff lacks standing.

B. The Complaint Fails to State a Claim.

Not only does Plaintiff lack standing, but the Complaint also fails to state a claim.

1. Standard of Review

To survive dismissal under Rule 12(b)(6), a plaintiff must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Id.* This applies to ERISA as well: a "careful, context-sensitive scrutiny of a[n ERISA] complaint's allegations," through a motion to dismiss, is the appropriate way to accomplish the "important task" of "divid[ing] the plausible sheep from the meritless goats." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). The motion to dismiss is an "important mechanism for weeding out meritless [ERISA] claims." *Id.* at 425–26.

2. Plaintiff Cannot State a Claim for Any Violation of ERISA Where an IRS Regulation Requires the Challenged Conduct.

Each of Plaintiff's claims attempts to turn the long-standing reallocation practice required under the IRS regulation, which Defendants followed, into *per se* ERISA violations. Doing what the IRS regulation requires cannot violate ERISA, and, therefore, all of Plaintiff's claims fail.

ERISA § 514(d) states that "[n]othing" in ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d). It is "'explicit that [ERISA] shall not be construed to invalidate or impair any federal regulation.'" *Martin v. Nat'l Bank of Alaska*, 828 F. Supp. 1427, 1433 (D. Alaska 1992) (quoting *First Nat'l Bank of Chi. v. Comptroller*, 956 F.2d 1360, 1368 (7th Cir. 1992)). Therefore, "[t]here can be no violation of ERISA" if a plan

"compl[ies] with a valid regulation." *First Nat'l Bank of Chi.*, 956 F.2d at 1368. In *First National Bank of Chicago*, for example, the Seventh Circuit held that a defendant could not be found to have violated ERISA by complying with a regulation promulgated by the Office of the Comptroller of the Currency. *Id.*

Similarly, courts have held that there can be no violation of ERISA where an entity complies with federal statutes, which are also subject to ERISA § 514(d). For example, bankruptcy courts have held that, although ERISA's anti-inurement rule could be read to prohibit the return of contributions to a debtor's estate in certain circumstances, bankruptcy courts can nonetheless order such a return if it is permitted by the Bankruptcy Code, and have rejected arguments that ERISA's anti-inurement rule "is an exception to the unambiguous language of [ERISA § 514(d)]". *See, e.g.*, *In re Pulaski Highway Express, Inc.*, 41 B.R. 305, 309 (Bankr. M.D. Tenn. 1984) (reasoning that "[t]he language of § 1144(d) could be no clearer: ***nothing*** in ERISA should be interpreted to impact other federal law" (emphasis in original)).

And the DOL agrees, particularly when it comes to the preeminence of the tax code and IRS regulations promulgated thereunder. The DOL has expressly advised that, "pursuant to ERISA section 514(d)[,]" plan trustees that comply with a section of the tax code concerning tax levies are "not . . . in violation of ERISA sections 403(c)(1) and 404(a)(1)." DOL Adv. Op. 79-90A, 1979 WL 7027, at *3 (Dec. 28, 1979).

ERISA § 514(d) applies here. Forfeitures of non-vested employer contributions are governed by the tax code. *See generally* 26 U.S.C. § 411. The current IRS regulation addressing forfeitures—effective since 1963—***requires*** the use of such amounts to reduce employer contribution obligations while providing ***an option*** to apply them to plan expenses generally, stating: "forfeitures arising . . . for any . . . reason . . . must be used as soon as possible to reduce the employer's contributions under the plan. However, a [] plan may anticipate the effect of forfeitures in determining the costs under the plan." 26 C.F.R. § 1.401-7(a) (1963). And the rule expressly prohibits what Plaintiff effectively seeks—entitlement to an additional benefit not stated in the Plan Document, of having his account's administrative expenses reduced by forfeited contributions—stating that forfeitures "must not be applied to increase the benefits any employee

would otherwise receive under the plan . . . ." *Id.* Therefore, Plaintiff's claims all fail pursuant to ERISA § 514(d) because they are premised on Defendants violating the IRS regulation to increase his own benefits through forfeitures. *See First Nat'l Bank of Chi.*, 956 F.2d at 1368.

This conclusion is consistent with the DOL's interpretation of ERISA. For example, like 26 C.F.R. § 1.401-7, the Securities Exchange Act of 1934 ("1934 Act") permits, but does not require, certain conduct. Specifically, it allows trustees or managers that exercise discretion with respect to an account—and are therefore fiduciaries as to ERISA accounts—to enter into "soft dollar" arrangements whereby they purchase goods or services with a portion of the brokerage commission paid for executing a transaction. *See* 15 U.S.C § 78bb(e). The DOL has interpreted these soft dollar arrangements to not violate ERISA (which they could otherwise) so long as the requirements of the 1934 Act's safe harbor are met, presumably to avoid impairing or otherwise conflicting with it. ERISA Technical Release No. 86-1 (1986) at 3–4, *available at* https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/technical-releases/86-01.pdf.

That 26 C.F.R. § 1.401-7 controls here is supported by both congressional and DOL endorsement of the principle underlying the regulation—that employers may reallocate forfeitures to reduce their other contribution obligations under the same plan—further demonstrating why Defendants did not violate ERISA for doing that precise thing. In promulgating the Tax Reform Act of 1986, which made certain modifications to the tax laws regarding forfeitures, Congress explained that:

> [F]orfeitures arising in any defined contribution plan . . . can be either (1) reallocated to the accounts of other participants in a nondiscriminatory fashion, or (2) ***used to reduce future employer contributions*** or administrative costs.

H.R. No. 99-841 (Conf. Report to Accompany H.R. No. 3838), Volume II at MTD371 (1986) (emphasis added), Rosenberg Decl. Ex. 9. And in 1979 the DOL issued an advisory opinion regarding a circumstance whereby, in a defined contribution plan like the Plan, "[f]orfeitures are applied to reduce future employer contributions" and provided guidance to the plan sponsor without suggesting that such a practice violated ERISA. *See generally* DOL Adv. Op. 79-56A, 1979 WL 7031 (Aug. 9, 1979).

The IRS recently re-affirmed this principle in a recent proposal to clarify the 1963 regulation, which states, in pertinent part:

> In the case of a trust forming a part of a qualified defined contribution plan . . . that provides for forfeitures, the plan must provide that:
> (1) Forfeitures will be used for one or more of the following purposes:
> (i) To pay plan administrative expenses;
> (ii) To reduce employer contributions under the plan; or
> (iii) To increase benefits in other participants' accounts *in accordance with plan terms*;

Use of Forfeitures in Qualified Retirement Plans, 88 Fed. Reg. 12282, 12285 (Feb. 27, 2023) (emphasis added). In explaining its proposal, the IRS emphasized that employing ***any*** of three permitted purposes would be acceptable:

> the proposed regulations would clarify that forfeitures arising in any defined contribution plan . . . ***may be used for one or more of the following purposes***, as specified in the plan: (1) to pay plan administrative expenses, (2) ***to reduce employer contributions under the plan***, or (3) to increase benefits in other participants' accounts in accordance with plan terms.

Id. at 12283 (emphasis added).

If Plaintiff is correct—that, notwithstanding the IRS regulation, ERISA effectively restricts Defendants' choice to only that one option that would increase individual participants' benefits regardless of the terms of a plan—then six decades of contrary regulations and guidance from the IRS, Congress, and the DOL would be eviscerated. His position would also read ERISA § 514(d) out of the statute. And it would fundamentally conflict with ERISA's approach to regulating benefit plans, which allows employers to decide what benefits to provide and how to fund them. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (statutes should be read as a whole, and individual provisions should be interpreted to "produce[] a substantive effect that is compatible with the rest of the law"). Indeed, "[e]mployers have large leeway to design . . . plans as they see fit." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003). Because Plaintiff points to nothing in the Plan that suggests it was designed to provide him or any other individual account with the benefit of having expenses otherwise deducted from individual accounts offset by forfeited amounts from other participants, his position must be rejected.

Not only do all counts of the Complaint fail under ERISA § 514(d) and the IRS regulation, but each Count of the Complaint suffers from other deficiencies as well, providing additional, alternative grounds to dismiss each.

3. Counts I and II Do Not State Claims for Fiduciary Breach.

(a) The Complaint Does Not Allege a Plausible Breach of Any Fiduciary Duties.

(i) The Court May Not Infer a Breach Where Defendants Followed a Long-Standing, Permitted Practice.

As described *supra* Section III.B.2, Plaintiff simply cannot plead any violation of ERISA where an IRS regulation explicitly requires the conduct he challenges. The Court may not infer a breach of ERISA's specific duties of loyalty or prudence where those claims are premised solely on Defendants following a common, longstanding practice, consistent with the IRS regulation, of reallocating forfeitures to other contribution obligations. In one case, for example, the court dismissed claims alleging that fiduciaries had violated their duties by not immediately allocating accrued assets held in a suspense account because "[n]either the Treasury Regulations implementing [the tax code], nor [the tax code], support plaintiffs' theory." *Rummel v. Consol. Freightways, Inc.*, No. 91-4168, 1992 WL 486913, at *6 (N.D. Cal. Sept. 17, 1992). So, too, here, Counts I and II should be dismissed.

(ii) ERISA's Fiduciary Duties Do Not Require Defendants to Increase Plaintiff's Benefits.

Counts I and II also fail because ERISA's fiduciary duties of loyalty and prudence do not mandate that Defendants reallocate forfeitures to Plaintiff's own individual account as additional benefits in the absence of Plan language ***requiring*** such action.

"ERISA does no more than protect the benefits which are due to an employee under a plan" and "'does not . . . require a fiduciary to resolve every issue of interpretation in favor of plan beneficiaries[,]'" nor does it "'create an exclusive duty to maximize pecuniary benefits.'" *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1100 (9th Cir. 2004) (quoting *Collins v. Pension & Ins. Comm. of S. Cal. Rock Prods. & Ready Mixed Concrete Ass'ns*, 144 F.3d 1279, 1282 (9th Cir. 1998)). "The aim of ERISA is to make the plaintiffs whole, but not to give them a windfall."

Henry v. Champlain Enters., Inc., 445 F.3d 610, 624 (2d Cir. 2006) (Sotomayor, J.).

Applying these principles, *Wright* affirmed dismissal of claims alleging violations of ERISA's duty of prudence and loyalty where the defendants "complied with the [p]lan's lawful terms." 360 F.3d at 1097, 1100. *Collins* is also instructive; there plaintiffs alleged that a retirement plan administrator "had a fiduciary duty to increase benefits," and the court affirmed dismissal of the plaintiffs' claims in part because "[t]he language of the plan [wa]s permissive; not mandatory" in that it permitted benefits to be increased but did not require such increase. *Collins*, 144 F.3d at 1282.

Counts I and II should therefore be dismissed for this reason as well. Plaintiff concedes that the Plan provides no entitlement that forfeitures will be used to pay Plan expenses otherwise borne by his account, but rather confers Defendants with "discretion" to either use forfeitures "to pay the Plan's expenses or reduce [Clorox's] contributions to the Plan." Compl. ¶ 23; *see also supra* pp. 5–6. Therefore, pursuant to *Wright* and *Collins*, neither ERISA's duty of loyalty or prudence required Defendants to essentially nullify the framework in the Plan Document by exclusively choosing to utilize forfeitures to pay Plan expenses—let alone any specific expenses—to "maximize pecuniary benefits" to Plan participants.

Moreover, Plaintiff's theory is not only inconsistent with this framework in the Plan Document but it also would require Defendants to violate another of the Plan Document's provisions, providing an additional reason why ERISA's fiduciary duties cannot require the use of forfeitures to defray expenses deducted from individual Plan accounts. The Plan requires that funds used to restore forfeited accounts "will be drawn first" from forfeitures. *Supra* p. 5 (citing Plan Document § 8.02(c)). This use of forfeitures must therefore take precedence over any payment of Plan expenses. But Plaintiff's preferred allocation of first applying forfeitures to individual participant expenses would preclude Defendants from complying with this provision. Defendants could not do both things "first." Because Defendants had a fiduciary duty to comply with the Plan Document as written, they did not breach their duties in declining to follow a practice that is not required and would possibly violate it. *See Collins*, 144 F.3d at 1282 (ERISA fiduciaries have a "duty to act in accordance with plan document[s]").

(b) The Complaint Does Not Adequately Allege that Defendants Acted as Fiduciaries with Respect to the Challenged Conduct.

Alternatively, Counts I and II should also be dismissed because they are premised on Defendants being fiduciaries with respect to the challenged conduct, but Plaintiff has not, nor could he have, adequately pleaded that Defendants acted as ERISA fiduciaries as to that conduct.

Under ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i), a person is a fiduciary with respect to a benefit plan, in relevant part, "to the extent . . . 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." Because one is only a fiduciary "to the extent" that she possesses authority or control over the plan, "fiduciary status under ERISA is not an 'all or nothing concept.'" *In re JDS Uniphase Corp. ERISA Litig.*, No. 03-4743, 2005 WL 1662131, at *2 (N.D. Cal. July 14, 2005) (quoting *Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1277 (11th Cir. 2005)). One is "a fiduciary only 'to the extent' that he acts in such a capacity in relation to a plan." *Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000). Therefore, the "threshold question" in evaluating such claims "'is not whether the actions of some person . . . adversely affected a plan beneficiary's interest [if there was such adverse impact], but whether that person was acting as a fiduciary . . . when taking the action subject to complaint." *Id.* at 226.

Courts may find "[a]s a matter of law", that a "complaint lacks allegations sufficient to find that [a defendant] was a [relevant] fiduciary under ERISA." *Tool v. Nat'l Empl. Benefit Servs., Inc.*, 957 F. Supp. 1114, 1119 (N.D. Cal. Nov. 18, 1996). Courts therefore routinely dismiss ERISA claims at the pleading stage where, like here, relevant fiduciary status is lacking. *See, e.g.*, *Pegram*, 530 U.S. at 231–34 (affirming dismissal for failure to plead ERISA fiduciary status).

Here, Plaintiff alleges that Defendants were fiduciaries under ERISA § 3(21)(A)(i) for their use of forfeitures to reduce Clorox's contributions because Defendants "exercised discretionary authority and discretionary control over the management and administration of the Plan" and "exercised authority or control respecting the management or disposition of" non-vested employer contributions, which he asserts were Plan assets. Compl. ¶¶ 9–10, 53. But Plaintiff is wrong. Because Defendants are not ERISA fiduciaries with respect to the challenged conduct,

Counts I and II should be dismissed for this alternative reason as well.

(i) Defendants Acted as Plan Settlors.

Defendants were not ERISA fiduciaries with respect to use of forfeitures because they were acting in a settlor, not fiduciary, capacity. Deciding what benefits to provide and how to fund them is a settlor function, whether that decision is made in advance and fixed in the plan document or whether, as here, the Plan Document is written to provide for those decisions on an ongoing basis.

"When employers undertake" plan design actions, "they do not act as fiduciaries, but are analogous to the settlors of a trust." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (reversing appellate decision that reversed a grant of a motion to dismiss). The establishment of a benefit plan and decisions regarding its administration and terms, including decisions concerning its funding, are plan design functions that sponsors undertake in their settlor roles. *Id.* These plan design, settlor functions include "decision[s] regarding the form or structure of the [p]lan such as who is entitled to receive [p]lan benefits and in what amounts, or how such benefits are calculated." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) (reversing appellate decision that reversed a grant of a motion to dismiss); *accord Pegram*, 530 U.S. at 226 (settlor acts include decisions about "[t]he specific payout detail of the plan").

Therefore, when Clorox established the Plan and set forth its provisions regarding the allocation of forfeitures, it was acting as a settlor and not as a fiduciary. The Committee was similarly acting in a settlor capacity when deciding how to allocate forfeitures among the only three choices provided in the Plan Document. Indeed, Plaintiff's theory is that the Committee should have made different decisions regarding the allocation of forfeitures to instead confer different benefits and cost obligations on Plan participants, which necessarily would force Clorox to make additional contributions to the Plan. But "decision[s] regarding the form or structure of the [p]lan such as who is entitled to receive [p]lan benefits and in what amounts" are quintessential settlor functions. *Hughes Aircraft Co.*, 525 U.S. at 444. Analogously, one court found that defendant committees were not acting as ERISA fiduciaries when determining what portion of employer contributions should be paid in company stock as compared to other forms, reasoning

that "[d]ecisions regarding the amount of company contributions are funding decisions, and funding decisions are settlor functions which do not implicate fiduciary duties." *In re Wachovia Corp. ERISA Litig.*, No. 09-262, 2010 WL 3081359, at *11 (W.D.N.C. Aug. 6, 2010). Looking at a nearly identical question, one court held that a decision to interpret a plan to not require a sponsor to make additional contributions, and to not distribute funds in a plan's suspense account to participants, were "plan design decision[] not subject to ERISA's fiduciary standards." *Burns v. Rice*, 39 F. Supp. 2d 1350, 1358 (M.D. Fla. 1998). The same result is appropriate here.

Accordingly, because Plaintiff is challenging what is essentially a settlor act—establishing the amount Clorox shall contribute to the Plan—Counts I and II should be dismissed.

(ii) Defendants Did Not Exercise Sufficient Discretionary Control Over Plan Administration or Management to Be Fiduciaries.

Even if Defendants were not acting as Plan settlors (which they were), Plaintiff has failed to adequately allege that Defendants exercised ***sufficient*** discretionary authority or control over Plan administration or management to render them fiduciaries with respect to the at-issue conduct.

To establish fiduciary status, Plaintiff must show that Defendants acted with sufficient discretion; Defendants "are only fiduciaries to the extent that they exercise discretionary authority with respect to the particular activity at issue." *In re JDS Uniphase Corp. ERISA Litig.*, 2005 WL 1662131, at *3. However, not all discretion, no matter how limited and circumscribed, rises to the level of fiduciary discretion. Indeed, even assuming the forfeitures were Plan assets under ERISA (they are not, as described *infra*), "[a]n entity which assumes discretionary authority or control over plan assets will not be considered a fiduciary if that discretion is sufficiently limited by a pre-existing framework of policies, practices and procedures." *Useden v. Acker*, 947 F.2d 1563, 1575 (11th Cir. 1991); *see also Gelardi v. Pertec Comput. Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985) (per curiam) ("processing claims within a framework of policies, rules, and procedures established by others" does not give rise to fiduciary status), *overruled on other grounds by Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011). *Useden* held that, even though a contract empowered a bank to make ***discretionary*** decisions concerning plan assets posted as security for a loan, the bank was nonetheless not a fiduciary under ERISA in seizing and disposing

of that collateral upon the plan's default because "clear [legal and contractual] standards circumscribed [its] discretion." *Useden*, 947 F.2d at 1575. The DOL has similarly recognized that, while brokers and others may have discretion over selling or otherwise closing out a plan's investments upon its default, it is not sufficient to rise to the level of fiduciary discretion where they exercise agreed rights as secured creditors and act within frameworks established by law. *See, e.g.*, DOL Adv. Op. No. 2013-01A, 2013 WL 582335, at *4 (Feb. 7, 2013).

Defendants' discretion here is limited by the Plan's terms, which permitted the Committee only three choices as to how to apply forfeitures and specified which one (restoration of previously forfeited amounts) was required "first." *Supra* p. 5. Any remaining "discretion" possessed by the Committee was further limited by the operative IRS regulation stating that forfeitures "must" be used "to reduce the employer's contributions under the plan" and "must not be applied to increase" individual benefits. 26 C.F.R. § 1.401-7(a). Indeed, the "discretion" conferred by the Plan as to the use of forfeitures—discretion that Plaintiff appears to believe should always be exercised in his favor, regardless of any other Plan terms or IRS guidance—is substantially more limited than that found in *Useden* and the DOL advisory opinion to not rise to the level of fiduciary discretion.

(iii) Forfeited Non-Vested Contributions Are Not Plan Assets.

Because the forfeitures were not Plan assets, Plaintiff has also failed to allege that Defendants acted as fiduciaries with respect to any management or disposition of such amounts.

"Plan assets under [ERISA § 3(21)(A)(i)] are to be identified based on ordinary notions of property rights[,]" including whether participants have a "beneficial ownership interest" in them. *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 658 (9th Cir. 2019) (affirming dismissal because at-issue assets were not plan assets) (internal quotation marks omitted). The Ninth Circuit has not defined a "beneficial" ownership interest in this context, but other courts have, holding it to mean that the "the plan sponsor [has] expresse[d] an intent to grant . . . or has acted or made representations sufficient to lead participants and beneficiaries of the plan to reasonably believe that such funds separately secure the promised benefits or are otherwise plan assets." *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 647 (8th Cir. 2007) (internal quotation marks

omitted).

Plaintiff acknowledges that the amounts at issue here are forfeited "nonvested" employer contributions. Compl. ¶ 23. He points to no expression by Clorox in the Plan Document or SPD or anywhere else that would lead him or any other participant to believe that non-vested contributions forfeited by other participants would be used to offset expenses otherwise deducted from his or other participants' Plan accounts. To the contrary, the Plan Document and SPD make clear that Plan participants have no vested interest in these employer contributions immediately—even contributions made to their own accounts, let alone contributions made to any other participant's accounts—but rather only earn such an interest over time according to set schedules or upon certain events occurring. *Supra* pp. 5–6. The documents further state that non-vested employer contributions "will" or "may" be forfeited under described circumstances. *Id.* And they disclose that, once forfeited, such amounts must first be used to restore previously forfeited participant accounts, and thereafter may be used to pay unidentified Plan expenses or reduce contributions to the Plan. *Id.*

Therefore, far from making representations that the forfeitures are Plan assets (let alone amounts that are to be used to offset expenses incurred by specific individual participants' accounts), Defendants have clearly disclosed to the Plan's participants that they have no interest in such amounts until and unless they are reallocated to their own Plan accounts. Courts regularly hold that "contingent and nonvested benefits" are not plan assets. *See, e.g.*, *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) (reasoning that such benefits are not plan assets because "ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued"). For example, *Kalda* held that participants lacked a beneficial ownership interest in amounts, and that those amounts were thus not plan assets, where the plan's documents did not contain any "vesting language" regarding them and the amounts did not constitute presently-accrued benefits. *Kalda*, 481 F.3d at 647–48. And Northern District of California courts have held that actions taken with respect to "contingent and nonvested benefits" do not implicate ERISA's fiduciary duties, also suggesting that such benefits are not plan assets. *E.g.*, *Cinelli v. Sec. Pac. Corp. Supplemental Grp. Life Ins. Plan*, No. 93-450, 1993 WL 795226, at

*7 (N.D. Cal. Nov. 22, 1993). Indeed, with respect to a challenge analogous to this one regarding how amounts were allocated within a plan, *Rummel* held that an employer did not act as an ERISA fiduciary when it allocated a surplus from a suspense account to certain current and former employees, but not to other former employees, because such benefits were not vested. *Rummel*, 1992 WL 486913, at *6.[22]

Because the at-issue amounts forfeited from other participants were not Plan assets, any alleged authority or control Defendants exercised over them cannot give rise to fiduciary status.

4. Count III Does Not State a Claim for Violation of ERISA's Anti-Inurement Rule.

Plaintiff's anti-inurement claim (Count III) should be dismissed for at least two additional reasons.

First, Count III fundamentally conflicts with ERISA's anti-inurement rule. That rule does not bar the reallocation of forfeited amounts, internally within the same plan, to offset future funding obligations, as Defendants did here. Rather, "[t]he purpose of the anti-inurement provision . . . is to apply the law of trusts to discourage abuses such as self-dealing, imprudent investment, and misappropriation of plan assets, by employers and others." *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 23 (2004). It bars certain benefits to an employer "at the expense of the plan." *State St. Bank and Tr. Co. v. Denman Tire Corp.*, 240 F.3d 83, 91 (1st Cir. 2001). It does not preclude any use of monies allocated to plan use from benefitting an employer in any way, however. For example, employers may receive "incidental" benefits, which are "legitimate", from operating a plan. *Lockheed,* 517 U.S. at 893. The anti-inurement provision also does not even preclude all payments to an employer from a plan. For example, ERISA permits repayment of expenses paid by an employer, just as the Plan here provides. ERISA § 408(c)(2); 29 U.S.C. § 1108(c)(2); Plan Document § 15.04. Rather, the anti-inurement rule is violated if an employer diverts plan assets to itself where it has "no claims" to them. *Perez v. Cal. Pac. Bank*, No. 13-3792, 2015 WL 5029452, at *1, 6-7 (N.D. Cal. Aug. 25,

[22] *Cf. Glazing Health and Welfare Fund v. Lamek*, 896 F.3d 908, 910 (9th Cir. 2018) (affirming dismissal of fiduciary breach claim because unpaid employer contributions are not plan assets).

2015).

Here, Plaintiff makes no claim that Defendants diverted forfeitures to Clorox's own pockets or converted them to its own uses outside of the Plan. Instead, Defendants reallocated them, consistent with the IRS regulation, to other Plan accounts to fund promised Plan benefits in accordance with the express terms of the Plan. Under the caselaw, using forfeited amounts to offset corporate contributions falls outside the anti-inurement rule. That conclusion is particularly true here, where the Plan Document further provides that Clorox could, in other circumstances, directly receive amounts held by the Plan, specifically, Clorox is entitled to reimbursement from the Plan for the portions of Plan expenses that it pays. *Supra* p. 6.

Second, the anti-inurement claim should be dismissed because non-vested employer contributions are not Plan assets. ERISA's anti-inurement rule requires that the amounts alleged to have inured to an employer's benefit be "assets of a plan." 29 U.S.C. § 1103(c)(1). Plaintiff alleges that the Plan assets that have purportedly inured to Clorox's benefit are non-vested employer contributions. Compl. ¶ 52. However, as described *supra* Section III.B.3.(b).(iii), such amounts are not Plan assets, and therefore Defendants' actions with respect to them cannot give rise to an anti-inurement claim.

Count III should therefore be dismissed.

5. Counts IV and V Do Not State Claims for Prohibited Transactions.

Counts IV and V, alleging violations of ERISA §§ 406(a)(1) and 406(b)'s prohibited transaction rules, should be dismissed for three additional reasons.

First, both ERISA §§ 406(a) and (b) require Plaintiff to "identify a[] transaction that falls within" their scope. *Wright*, 360 F.3d at 1101. But Plaintiff has not, and cannot, adequately allege that the reallocation of forfeitures internally within the same plan were transactions governed by ERISA §§ 406(a) or (b).

ERISA § 406(a) governs only transactions between a "plan and a party in interest", and ERISA § 406(b) governs only transactions between a "plan and [a] fiduciary." 29 U.S.C. §§ 406(a)–(b). A plan cannot be a "party in interest" or a "fiduciary" to itself, as those terms are defined by reference to a person's relationship to a plan. *See* ERISA § 3(14)(B), 29 U.S.C.

§ 1002(14)(B) ("The term 'party in interest' means, as to an employee benefit plan . . . ."); *see also* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) ("a person is a fiduciary with respect to a plan . . . ."). On their face, then, those prohibitions do not apply to transactions internal to a plan—*i.e.*, where the plan is on both sides. The DOL has repeatedly taken the view, for example, that the transfer of capital and other transactions between a plan and a wholly-owned subsidiary do not fall under ERISA § 406 because they are "intra-plan transactions, rather than transactions between the [p]lan and a party in interest" or fiduciary. DOL Adv. Op. 97-23A, 1997 WL 606991, at *2 (Sept. 26, 1997); DOL Adv. Op. 2005-03A, 2005 WL 1482886, at *4 (Mar. 23, 2005).

Consistent with this view, courts have emphasized that ERISA §§ 406(a) and (b) are concerned with transactions that involve "commercial bargains." *Wright*, 360 F.3d at 1101 (citing *Lockheed*, 517 U.S. at 893). In particular, they are concerned with commercial bargains that "present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length" and not with "the payment of benefits pursuant to the terms of an otherwise lawful plan." *Lockheed,* 517 U.S. at 892–93. Thus, ERISA §§ 406(a) and (b) do not cover "lawful decision[s] to remain in full compliance with the explicit language of the [p]lan's terms[.]" *Wright*, 360 F.3d at 1101 (affirming dismissal of ERISA §§ 406(a) and (b) claims).

Defendants' reallocation of forfeitures, internally within the Plan, to contribution obligations involved no "commercial bargains" with other parties, or even with themselves. And the reallocations are expressly designed to promote the funding of the Plan—the opposite of a transaction that has "a special risk of plan underfunding" in *Lockheed*'s parlance. The reallocation decisions were made in compliance with the Plan's terms, *supra* pp. 5–6, and were fully consistent with applicable law—the IRS regulation—and subsequent guidance from Congress and the DOL. *Supra* Section III.B.2. For these reasons, the reallocations cannot be viewed as transactions subject to ERISA §§ 406(a) and (b).

Second, Counts IV and V fail to state a claim because Plaintiff has not adequately alleged that Defendants were fiduciaries when reallocating forfeitures. By their terms, both ERISA §§ 406(a)(1) and 406(b) only bar the specified conduct if done by "[a] fiduciary." 29 U.S.C. §§ 1106(a)(1), (b). The Ninth Circuit has therefore held that "to establish liability under [ERISA]

§ 1106, a party must prove that '***a fiduciary*** caused the plan to engage in the allegedly unlawful transaction.'" *Wright*, 360 F.3d at 1101 (quoting *Lockheed*, 517 U.S. at 888)) (emphasis added). Because Plaintiff has not adequately alleged relevant fiduciary status (*see supra*, at Sections III.B.(b).(i)–(iii)), Counts IV and V should be dismissed. *See id.* (affirming dismissal of prohibited transaction claims "because [plaintiffs] have failed to establish that the [defendant] is a fiduciary").

Third, Counts IV and V fail to state a claim to the extent they are premised on purported transactions involving Plan assets because Plaintiff has failed to adequately allege that the forfeitures were Plan assets under ERISA. Count IV alleges a violation of ERISA §§ 406(a)(1)(A) and (D) and Count V alleges a violation of ERISA § 406(b)(1). *See* Compl. ¶¶ 57, 63. ERISA §§ 406(a)(1)(A) and (D) and ERISA § 406(b)(1) require the at-issue transactions to involve "property" or "assets of the [P]lan." 29 U.S.C. §§ 1106(a)(1)(D), 1106(b)(1). Counts IV and V should therefore be dismissed because the at-issue amounts were not Plan assets (*see supra*, at Section III.B.3.(b).(iii)). *See Thondukolam v. Corteva, Inc.*, No. 19-3857, 2020 WL 1984304, at *4 (N.D. Cal. Apr. 27, 2020) (granting motion to dismiss prohibited transaction claim because "the [complaint] does not plead facts showing that the [p]lan or its assets were involved").

Counts IV and V should therefore be dismissed.

6. Count VI Does Not State a Claim for a Failure to Monitor Fiduciaries.

Count VI, which alleges that Clorox failed to adequately monitor the Committee, fails to state a claim because Plaintiff has not plausibly alleged any violations of ERISA by the Committee. Claims for failure to monitor fiduciaries are "derivative" of underlying breach of fiduciary duty claims and "necessarily fail[]" if those underlying claims are "subject to dismissal." *Wehner v. Genentech, Inc.*, No. 20-6894, 2021 WL 507599, at *11 (N.D. Cal. Feb. 9, 2021) (dismissing failure to monitor claim for this reason). Because Plaintiff fails to plead any breaches of fiduciary duties by the Committee, Count VI should also be dismissed. *Id.*

IV. Conclusion

For the foregoing reasons, the Complaint should be dismissed with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on December 13, 2023. I further certify that all participants in the case are registered CM/ ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed on December 13, 2023.

/s/ James O. Fleckner
James O. Fleckner