

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:24-cv-921-MOC-DCK**

**ESMERALDA BECERRA, individually)
and as representative of a class of)
participants and beneficiaries and on)
behalf of the Bank of America 401K)
Plan,)**

Plaintiff,

v.

**BANK OF AMERICA
CORPORATION, et al.,**

Defendants.

ORDER

THIS MATTER is before the Court on a Motion to Dismiss Plaintiff Esmeralda Becerra’s Amended Complaint filed by Defendants Bank of America Corporation (“BOA”), Bank of America Corporation Corporate Benefits Committee (the “Benefits Committee”), and Does 1-10 (“Defendants”). (Doc. No. 48). Plaintiff filed a response, and Defendant filed a reply. (Doc. Nos. 50, 51). The parties have filed notices of supplemental authority. (Doc. Nos. 52–55). This matter is now ripe for disposition.

I. Background

The Bank of America 401(k) Plan (the “Plan”) is a defined contribution, individual account plan under ERISA. (Doc. No. 47 at ¶ 13). In such a plan, each participant’s benefit depends on the assets in his or her account, including contributions and investment gains or losses. (*Id.* ¶ 16). Defendant BOA is the Plan’s sponsor, and the Benefits Committee is the designated administrator. (*Id.* ¶ 14).

The Plan helps BOA employees save for retirement through two main funding sources: (1) voluntary deferrals withheld from participant's wages; and (2) employer contributions. (Id. ¶ 19). There are two subcategories of employer contributions: (1) matching contributions by BOA for those who contribute to the Plan; and (2) non-elective "Annual Company Contributions" made to eligible participants even if they did not elect to contribute. (Id.). Participant deferrals, and any investment earnings on those deferrals, are always fully vested, as are BOA's matching contributions. (Id. ¶ 20). Other employer contributions are subject to a vesting schedule specified in the Plan; Annual Company Contributions vest after three years of service. (Id.).

If a participant's employment terminates before completing the applicable vesting period, any unvested contributions are forfeited. (Id. ¶ 21). When this occurs, the Plan mandates how such "forfeitures" shall be used. First, forfeitures must be reallocated to restore prior forfeitures for any employees who returned to BOA within a specified period. (Id. ¶ 21). Second, any remaining forfeitures "shall be a source of any type of Participating Employer contributions for the Plan Year, including without limitation safe harbor Matching Contributions and QNECs, or shall be used to pay reasonable expenses of the Plan, as determined by the Committee in its sole discretion." (Id. ¶¶ 21, 32). The Plan also describes what must be done with trust assets, outlining that they must be used for the "benefit of Participants and their Beneficiaries" and "reasonable expenses of administering the Plan" and that they must not be used for or returned to the "Participating Employer[]" or for any other purpose prior to the satisfaction of all liabilities. (Id. ¶ 33).

The Plan offers a range of investment options in which participants may choose to invest their accounts, including mutual funds, collective investment trusts, the Stable Value Fund, and a Bank of America Corporation Common Stock Fund. (Id. ¶ 22). The Plan holds a portion of its

assets in the Stable Value Master Trust (the “Master Trust”), which provides a collective investment vehicle for the Stable Value Fund, and is held by BOA as trustee. (Id. ¶ 23). The terms of the underlying investment contracts in the Master Trust are benefit responsive, providing a guarantee by the issuer to pay principal plus accrued interest in response to benefit-related requests for payment. (Id. ¶ 25). The value of the Plan’s interest in the Master Trust is based on the beginning value of the Plan’s interest in the Master Trust plus actual contributions and allocated investment income minus actual distributions and allocated administrative expenses. (Id. ¶ 26). The underlying contracts deduct administrative expenses “off the top”; in 2023, these fees included \$328,216 allocated to the Plan. (Id. ¶ 27).

In 2023, \$5.6 billion of the Plan’s total investments of \$53.95 billion million were held in the Master Trust. (Id. ¶ 28). Plaintiff held \$460.74 in the Stable Value Fund as of December 31, 2022, and \$705.42 in the Stable Value Fund as of December 31, 2024. (Id. ¶ 31). In each year from 2021 to 2023, over \$1.5 million were in expenses were deducted from the Stable Value Fund. (Id. at 30).

Plaintiff brought this action on August 9, 2024. (Doc. No. 1). On March 19, 2025, Plaintiff filed an Amended Complaint, alleging that “Defendants have used millions of dollars in forfeited Plan assets to offset employer contributions”—not to defray Plan expenses. (Id. ¶ 34). As a result, Plaintiff claims that Defendants: (1) breached their fiduciary duty to Plaintiff under 29 U.S.C. § 1104; (2) violated ERISA’s anti-inurement provision under 29 U.S.C. § 1103; (3) engaged in prohibited transactions under 29 U.S.C. § 1106; and (4) failed to monitor fiduciaries.

II. Legal Standard

Defendants have moved to dismiss under FED. R. CIV. P. 12(b)(6). Under FED. R. CIV. P. 8(a)(2), a complaint must contain “a short and plain statement of the claim showing that the

pleader is entitled to relief.” A Rule 12(b)(6) motion tests the sufficiency of the complaint by asking whether the Plaintiff “has stated a cognizable claim.” Holloway v. Pagan River Dockside Seafood, Inc., 669 F.3d 448, 452 (4th Cir. 2012). In reviewing a 12(b)(6) motion, the Court must accept as true all factual allegations in Plaintiff’s complaint and draw all reasonable inferences therefrom in the light most favorable to Plaintiff. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007). That said, to survive Defendants’ 12(b)(6) motion, Plaintiff’s factual allegations “must be enough to raise a right to relief above the speculative level,” such that the complaint contains “enough facts to state a claim to relief that is plausible on its face.” Id. at 570. Consequently, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements” are insufficient to survive a 12(b)(6) motion. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 555). Instead, a complaint survives only if it “states a plausible claim for relief” that “permit[s] the court to infer more than the mere possibility of misconduct” based upon “its judicial experience and common sense.” Id. at 679 (citations omitted).

III. Discussion

A. Whether Plaintiff Stated a Claim for Breach of Fiduciary Duty

Plaintiff first claims that Defendants have breached their fiduciary duty to Plaintiff. “To state a claim for breach of fiduciary duty under ERISA, a plaintiff must allege that (1) the defendant was a fiduciary; and (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); see also 29 U.S.C. § 1109(a). ERISA requires fiduciaries to discharge their duties “solely in the interest of the participants and beneficiaries.” 29 U.S.C. § 1104(a)(1). ERISA also “imposes a ‘prudent person’ standard by which to measure fiduciaries’ investment decisions and disposition

of assets.” Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 419 (2014) (citation omitted); 29 U.S.C. § 1104(a) (1)(B).

Defendants first argue that there was no fiduciary conduct because Defendants actions related to the Plan were taken in a “settlor capacity” and not as fiduciaries. (Doc. No. 49 at 18). The “threshold question” for any alleged fiduciary breach is whether the defendant “was acting as a fiduciary (that is, performing a fiduciary function) when taking the action subject to complaint.” Pegram v. Herdrich, 530 U.S. 211, 225–26 (2000); see also Reetz v. Aon Hewitt Inv. Consulting, Inc., 74 F.4th 171, 180 (4th Cir. 2023). Defendants explain that the decision to offer a plan and related decisions over its terms, including how it will be funded and whether to make contributions, are corporate decisions made in a settlor capacity. See Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999). Defendants claim that, here, Defendants were merely declining to deviate from the terms of the Plan, which involves no discretion. Specifically, Defendants contend that, because Plaintiff does not allege that she paid any administrative expenses of the Plan, the Plan mandated that forfeitures be used as a source of employer contributions.

Defendants also argue that even if there was fiduciary conduct, there was no breach of duty. Defendants explain that Plaintiff’s allegations of a breach are conclusory and that Defendants used the forfeitures as the Plan required, which cannot be a breach. Defendants argue that “numerous courts” have dismissed similar claims even when fiduciaries have a choice over how to use forfeitures because it is not disloyal nor imprudent to fail to maximize pecuniary benefits. Hutchins v. HP Inc., 737 F. Supp. 3d 851 (N.D. Cal. 2024).

Plaintiff responds that Defendants did have discretion, because, under the Plan, they had the option of using forfeitures to offset employer contributions or to pay down reasonable Plan

expenses. Plaintiff argues that Defendants erroneously assume that “reasonable expenses of the Plan” only include administrative expenses, even though the language of the Plan contains no such limitation. Plaintiff also argues that fees withdrawn from the Master Trust are administrative expenses borne by the Plan, and that any amount withdrawn from it reduces Plan assets and is thus a Plan expense.

With respect to fiduciary conduct, Plaintiff highlights that, under ERISA, fiduciaries must act “for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan.” 29 U.S.C. § 1104 (a)(1)(A)(ii). Plaintiff argues that systematically using forfeitures to cover employer contributions, thus reducing Defendants’ own costs rather than alleviating participants’ expenses, is a loyalty breach, and does not meet the prudent person standard of fiduciaries under ERISA. Plaintiff points to case law finding similar actions to be a breach of fiduciary duty because it “put the employer’s interests above the interests of the Plan participants.” Perez-Cruet v. Qualcomm Inc., No. 23-CV-1890-BEN (MMP), 2024 WL 2702207, at *2 (S.D. Cal. May 24, 2024).

The Court will not dismiss Plaintiff’s claim for breach of fiduciary duty. The claims and arguments made by both parties involve questions about how to interpret the Plan, and courts have come to different conclusions as to when there is a fiduciary duty under ERISA and what constitutes a breach. At this stage, Plaintiff has stated sufficient facts to support the claim that Defendants were exercising discretion as fiduciaries. Moreover, Plaintiff has sufficiently stated a claim that Defendants breached their fiduciary duties by using Plan assets to lower new employer contributions.

B. Whether Plaintiff Stated a Claim Under ERISA’s Anti-Inurement Provision

Next, Defendants argue that Plaintiff has failed to state a claim for violation of ERISA’s

anti-inurement clause. Under the statute, “the assets of a plan shall never inure to the benefit of any employer” and must be held “for the exclusive purposes” of benefiting participants. 29 U.S.C. § 1103(c)(1).

Defendants argue that forfeitures are not removed from the Plan, and they are used to provide benefits to participants, so they do not violate ERISA. Defendants explain that ERISA’s anti-inurement provision is focused on the removal or diversion of assets from a plan. Defendants point to Supreme Court precedent holding that there is no ERISA violation where plaintiffs “do not allege that [defendant] used any of the assets for a purpose other than to pay its obligations to Plan beneficiaries.” Hughes Aircraft, 525 U.S. at 443. Defendant also notes that ERISA does not prohibit allocations that indirectly benefit the employer. Id. at 445–46; see also Lockheed Corp. v. Spink, 517 U.S. 882, 892–93 (1996) (holding that using surplus funds to offer early retirement benefits was lawful under ERISA).

Plaintiff responds that Defendants’ arguments put form over substance in insisting that anti-inurement rules are not triggered so long as forfeitures remain in the Plan. Plaintiff insists that the anti-inurement provision still applies when assets are being diverted to benefit the employer at the participants’ expense. Plaintiff distinguishes Hughes, explaining that, in that case, the Supreme Court focused on the fact that the employer had not used any plan assets “for a purpose other than to pay its obligations to Plan beneficiaries.” 525 U.S. at 443. Here, Plaintiff notes, Defendants are using forfeitures to reduce their own funding obligations and save money that they otherwise would have had to contribute anew—a purpose other than paying obligations to Plan beneficiaries.

The Court finds that Plaintiff has plausibly alleged that plan assets were not allocated for the exclusive benefit of participants. Plaintiff’s anti-inurement claim will not be dismissed.

C. Whether Plaintiff Stated a Claim for Prohibited Transactions Under ERISA

Defendants also argue that Plaintiff's prohibited transactions claim should be dismissed. To state a claim under Section 1106, a plaintiff must allege that a fiduciary caused the Plan to engage in certain transactions with a "party in interest." 29 U.S.C. § 1106(a)(1). The statute prohibits transactions between a plan and fiduciary in which a fiduciary "deal[s] with assets of the plan in his own interest or for his own account." *Id.* § 1106(b)(1).

Defendants argue that Plaintiff does not allege a transaction within the meaning of the statute because intra-Plan transfers are not a transaction. Defendants point to Spink, which explained that Congress intended the Section to reach commercial bargains that present a special risk of plan underfunding, and not "payment of benefits" under a plan. 517 U.S. at 893. Defendant also points to a "growing list" of courts rejecting claims like this one in ERISA forfeiture cases. (Doc. No. 51 at 17).

Plaintiff responds that she has plausibly alleged a use of Plan assets—the exchange or reallocation of Plan assets to offset future employer contributions—that has been recognized as a transaction by other courts. Rodriguez v. Intuit Inc., 744 F. Supp. 3d 935, 948–49 (N.D. Cal. 2024); Qualcomm, 2024 WL 2702207, at *6. Plaintiff explains that Defendants are fiduciaries, and using Plan assets to reduce Defendants' contribution obligation is self-dealing and violates Section 1106.

The Court finds that Plaintiff has stated a claim for violation of the ERISA prohibited transactions provision. Contrary to Defendants' argument, Spink does not control here—that case held that a quid pro quo between an employer and plan participants (e.g. the payment of benefits to participants) is not a transaction under Section 406(a). 517 U.S. at 892–93. Here, the alleged transaction at issue is not the paying out of benefits, but the exchange of Plan assets to

offset future employer contributions. See Qualcomm, 2024 WL 2702207, at *6. Plaintiff has plausibly alleged that Defendants, as fiduciaries, engaged in such a transaction, and this claim will not be dismissed.

D. Failure to Monitor

Finally, Defendants assert that Plaintiff's failure to monitor claim should be dismissed. However, Defendants' only argument in support is that this claim is derivative of Plaintiff's other claims. Because the remaining claims will not be dismissed, this claim will also proceed.

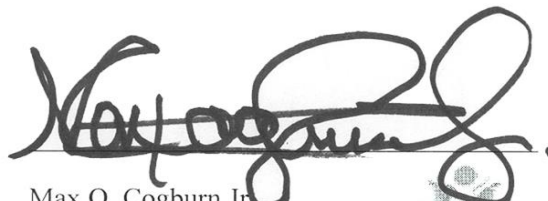
IV. Conclusion

For the above reasons, the Court will deny Defendants' motion to dismiss Plaintiff's Amended Complaint.

ORDER

IT IS, THEREFORE, ORDERED, that Defendants' motion to dismiss, (Doc. No. 48), is **DENIED**.

Signed: August 12, 2025



Max O. Cogburn Jr.
United States District Judge