No. 25-2441

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS O. MATULA, JR.,
Plaintiff-Appellant,

v.

WELLS FARGO & COMPANY, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
0:24-cv-03703-JRT-DJF (Hon. John R. Tunheim)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ERISA INDUSTRY COMMITTEE, AND THE NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Each of the *Amici Curiae* individually certifies that it is a non-profit corporation, that it does not have a parent corporation, and that no publicly held corporation has ten percent or greater ownership.

Dated: November 26, 2025

s/ Jordan Bock
Jordan Bock

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.

The ERISA Industry Committee ("ERIC") is a national non-profit business trade association representing approximately 100 of the nation's largest employers in their capacity as sponsors of employee benefit plans for their workers, retirees, and families.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. As the retail industry's umbrella group, the NRF regularly submits *amicus curiae* briefs in cases raising significant legal issues that are important to the retail industry, including the operation of employee retirement plans.

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[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than *Amici*, their members, and their counsel made a monetary contribution to fund the preparation or submission of this brief.

Many of *Amici*'s members maintain, administer, and/or provide services to employee-benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), covering virtually all Americans who work in the private sector and participate in employer-sponsored programs. *Amici* regularly participate as *amicus curiae* in this Court and others on issues affecting benefit-plan design or administration. *See, e.g.*, *Cunningham v. Cornell Univ.*, 604 U.S. 693 (2025); *Hughes v. Nw. Univ.*, 595 U.S. 170 (2022); *Barrett v. O'Reilly Auto., Inc.*, 112 F.4th 1135 (8th Cir. 2024).

Amici file this brief to provide the Court with greater context and historical background regarding employers' use of forfeited employer contributions, and to explain why an employers' use of those forfeited contributions to offset other employer contributions does not give rise to liability for a breach of fiduciary duty.

INTRODUCTION

Employees are always fully vested in their own contributions to their defined-contribution retirement plans. ERISA requires no less. But the rule is different for employer contributions, which under ERISA can be made subject to a vesting schedule that encourages employee retention. When retirement plan participants leave their employment before their employer's retirement contributions fully vest, they forfeit their interest in the non-vested portion of those employer contributions. Under ERISA, the forfeited employer contributions cannot be refunded to the employer; they must stay in the plan and be used to defray the reasonable expenses of administering the plan or to provide plan benefits. Employers that sponsor retirement plans recognize this, and in anticipation often design their plans to permit those forfeited amounts to be used for employer contributions for participants who remain in the retirement plan. In other words, employers write their plans to permit forfeited employer contributions of former employees to be used as employer contributions for other employees who remain in the plan.

Until a recent rash of lawsuits, this common practice was understood to be entirely permissible under ERISA. The Treasury Department (which regulates employee-benefit plans alongside the Department of Labor) provided that this practice conforms to the provisions of the Internal Revenue Code governing tax-advantaged retirement plans. For decades—predating ERISA's enactment—the

Treasury Department has expressly allowed the use of forfeited contributions in these tax-advantaged plans to offset employer contributions under the Tax Code, including Tax Code provisions that mirror ERISA's fiduciary provisions. Congress has acknowledged the same. It would be not just exceedingly odd but legally incoherent for ERISA to impose fiduciary liability for a practice that is allowed under the Tax Code's analogous regulations and does not result in participants receiving fewer benefits than they were promised. In reliance on this settled understanding, many employers have specified in plan documents that they have the flexibility to choose whether to use forfeitures to offset employer contributions or for other permissible purposes, *e.g.*, to pay the reasonable expenses of administering the plan or to make corrective adjustments to participants' accounts. Importantly, when a plan containing this type of provision is submitted to the Internal Revenue Service for an advance determination that the plan meets all required provisions of the Tax Code, the IRS has for decades issued favorable "determination letters" confirming that the plan meets these requirements.

Plaintiff invites this Court to disrupt the long-standing consensus regarding the use of forfeitures. His theory is that forfeitures may not be used as employer contributions, notwithstanding that Wells Fargo's Plan documents expressly authorize just that. He offers no valid basis for upending widespread settled expectations or contradicting the Treasury Department's position by adopting this novel approach. To the contrary, Plaintiff's theory is fundamentally inconsistent with a foundational tenet of ERISA—that an employer has discretion regarding whether and on what terms to provide benefits, including whether and how to contribute its own money to pay for those benefits. Apart from an employer's contractual obligations, as set out in plan documents, an employer is not obligated to provide any particular level of benefits, nor to provide employees *more* than their contractually defined benefits. And here, there is no dispute that Wells Fargo followed its Plan documents to a T. The Court should reject Plaintiff's efforts to require employers to offer purported benefits—here, covering fees beyond the Plan's administrative expenses (including management fees for individual participants' investment elections and costs specific to an individual, such as a qualified domestic relations order for someone getting divorced) or making unspecified "adjustments" to accounts——that have no basis in the text of ERISA or the Plan documents.

ARGUMENT[2]

I. The use of forfeitures for employer contributions has extensive historical support.

Decades of practice reflected in a long-existing regulation, legislative history, and a proposed clarifying regulation demonstrate that retirement plans may operate *exactly* in the way that Plaintiff faults Wells Fargo's Plan for operating here.

This extensive history is highly relevant. ERISA commands fiduciaries to act "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." 29 U.S.C. § 1104(a)(1)(B). Despite Plaintiff's novel theory about how plans *should* operate, a long-established practice based on a settled understanding of the relevant regulatory and statutory context clearly bears both on what a plan sponsor designing its plan would expect, and on how a reasonable and prudent fiduciary would act "under the

[2] As explained in Wells Fargo's Response Brief, Plaintiff's claims fail for two additional reasons beyond those addressed in this brief. First, Plaintiff cannot show that Wells Fargo's decision to apply forfeitures to employer contributions resulted in any harm to Plaintiff. *See* Response Br. 15-23. Second, the Plan does not authorize the use of forfeitures for any of the uses Plaintiff identifies. *See* Response Br. 39-42. Given *Amici*'s vast experience and expertise with plan administration, including the use of forfeitures, this brief focuses on the alternative argument (briefed by both parties) that Plaintiff's complaint failed to state a claim. Response Br. 37-50. In so doing, *Amici* seek to address Plaintiff's erroneous contentions regarding the limitations on plan sponsors' ability to use forfeitures to cover employer contributions.

circumstances then prevailing." Against this backdrop, Plaintiff's theory flies in the face of how plans have been operating—with agency approval—for decades.

A. The Treasury Department's long-standing view of forfeitures validates Wells Fargo's approach.

1. The Treasury Department's treatment of forfeitures informs the proper interpretation of ERISA.

The Treasury Department's understanding of how forfeitures may be used is highly probative because ERISA and the Tax Code are inextricably linked. Indeed, the "401(k)" in "401(k) plan" is a Tax Code designation, not an ERISA designation, and ERISA itself amended the Tax Code and serves as the source of many of the Tax Code's requirements for plans to qualify for tax-advantaged status. *See, e.g.*, U.S. Dep't of Lab., *History of EBSA and ERISA*, https://bit.ly/45UrBeC ("Title II of ERISA, which amended the Internal Revenue Code to parallel many of the Title I rules, is administered by the IRS."). The Department of Labor ("DOL") and the Treasury Department therefore coordinate in promulgating regulations and enforcing ERISA to the extent the statutes overlap. *See* 29 U.S.C. § 1204(a). Congress sensibly mandated this coordination to reduce "conflicting or overlapping requirements" as well as "the burden of compliance with such provisions by plan administrators, employers, and participants and beneficiaries." *Id.* Accordingly, the Treasury Department also has the statutory authority to apply particular provisions of ERISA, including its vesting provisions. *See* Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1, 92 Stat. 3790 (transferring relevant authority to the Treasury Secretary); 29 U.S.C. § 1202(c) (Treasury Department's authority over ERISA's participation, vesting, and funding standards). It likewise has non-exclusive enforcement authority with respect to prohibited transactions. *See* 26 U.S.C. § 4975.

The Tax Code and ERISA contain a number of parallel provisions, and courts appropriately look to the Treasury Department's interpretation of the Tax Code for guidance on the proper interpretation of the corollary provision in ERISA. *See, e.g.*, *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 746 (2004) (reasoning that an IRS interpretation of the Tax Code could shed light on the meaning of a parallel ERISA provision). In particular, Wells Fargo's Plan—like all tax-advantaged retirement plans—must comply with provisions in the Tax Code both to ensure the deductibility of employer contributions and the tax deferral of employer and pre-tax employee contributions and investment earnings. *See* 26 U.S.C. § 401. One of those provisions is 26 U.S.C. § 401(a)(2), which lists the requirements for a trust to be treated as a "qualified" retirement plan—including that assets in the trust not be "used for, or diverted to, purposes other than for the exclusive benefit of" the employees and beneficiaries for whom the trust is established. ERISA has an analogous provision, 29 U.S.C. § 1104(a)(1)(A), that directs fiduciaries to act "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose" of providing benefits to participants and defraying reasonable plan expenses. Whether conduct is consistent with the "exclusive benefit" language in § 401(a)(2) of the Tax Code is thus directly relevant to whether that same conduct is consistent with ERISA's analogous "exclusive purpose" provision. And critically, it is § 1104(a)(1)(A) that provides the basis for Plaintiff's claim for breach of the duty of loyalty. Opening Br. 13, 47-48.

2. The Treasury Department has long permitted employers to use forfeitures to reduce employer contributions.

For more than 60 years (even before ERISA's enactment), Treasury Department regulations have expressly authorized using forfeitures to reduce employer contributions, at least for certain types of plans. Before ERISA's enactment, the Treasury Department promulgated a regulation *requiring* qualified pension plans (*i.e.*, defined-benefit plans) to contain provisions expressly providing that forfeitures "be used as soon as possible to reduce the employer's contributions under the plan." 26 C.F.R. § 1.401-7(a). Under this regulation, forfeitures in fact could *not* "be applied to increase the benefits any employee would otherwise receive under the plan." *Id.*; *see also* Rev. Rul. 67-68, 1967-1 C.B. 86, 1967 WL 15409, at *1 (Jan. 1, 1967). The Treasury Department later invoked this provision when explaining that defined-contribution plans—like Wells Fargo's Plan—could satisfy the Tax Code's § 401(a) qualification provisions where they provide that "forfeitures are to be used to reduce the employer contributions that would otherwise be required under the plan." Rev. Rul. 71-313, 1971-2 C.B. 203, 1971 WL 26693, at *1 (Jan. 1, 1971). Critically, the § 401(a) qualification provisions include the "exclusive benefit" requirement that mirrors ERISA. *See supra*, pp. 6-8.

Informal guidance from both DOL and the Treasury Department has only bolstered this understanding over the past 50 years, repeatedly making clear that employers who sponsor defined-contribution plans may use forfeitures to reduce employer contributions. In 1979, after ERISA was enacted, DOL provided a set of opinions on a defined-contribution plan for which forfeitures were "applied to reduce future employer contributions." U.S. Dep't of Lab. Advisory Op. No. 79-56A, 1979 WL 7031, at *2 (Aug. 9, 1979). While addressing at length certain other aspects of the plan, DOL notably never suggested that the plan's use of forfeitures violated ERISA. *See id.*

The Treasury Department has been even more explicit. In 2010, the IRS explained to employers sponsoring defined-contribution plans that "forfeitures may be used to pay for a plan's administrative expenses and/or to reduce employer contributions." Dep't of the Treasury, Internal Revenue Serv., *Retirement News for Employers* 4-5, Publ'n 4278-B (May 2010), https://bit.ly/3Tp0lh0 ("*Retirement News for Employers*").[3] It would entirely upend this understanding if this same conduct were suddenly held to violate ERISA.

[3] While this publication cites 26 C.F.R. § 1.401-7(a), which governs pension plans, it does so in the context of addressing the treatment of forfeitures for defined-contribution plans.

B. Congress has likewise consistently recognized that forfeitures may and will be used to reduce employer contributions.

The history of the Tax Code demonstrates that Congress holds the same understanding as the Treasury Department. In 1986, Congress amended 26 U.S.C. § 401(a)(8)—which prohibits using forfeitures to "increase the benefits any employee would otherwise receive"—to clarify that this prohibition applies to defined-benefit plans. Pub. L. No. 99-514, § 1119(a), 100 Stat. 2085 (1986). In explaining the bill, however, the House Conference Report made clear that Congress understood existing law to *already* permit defined-contribution plans to "reduce future employer contributions or to offset administrative expenses." H.R. Rep. No. 99-841, Vol. II at 442 (1986). As the Supreme Court has recognized, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (citation omitted). That principle is particularly forceful where Congress did not simply *silently* fail to revise the administrative interpretation, but rather echoed it in describing then-existing law.

Most recently, the Treasury Department has proposed a regulation to "clarify that," as described in the House Conference Report, "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." 88 Fed. Reg. 12282, 12283 (Feb. 27, 2023) (emphasis added) (citing the House Conference Report). The purpose of this regulation was to clarify uses of forfeitures that would *not violate* the Tax Code's qualification provisions, including the ERISA-analogous "exclusive benefit" provision, 26 U.S.C. § 401(a)(2), which the Treasury Department referenced expressly. 88 Fed. Reg. at 12282.

C. Plaintiff is wrong that Wells Fargo violated ERISA by doing what the Treasury Department authorized.

Plaintiff argues that "tax-qualification permissibility does not excuse disloyal or imprudent fiduciary implementation under Title I." Opening Br. 50-51. But that ignores how inextricably intertwined ERISA is with the Tax Code. Indeed, as noted above, the very ERISA fiduciary obligation Plaintiff points to—ERISA's "[p]rudent man standard of care" in 29 U.S.C. § 1104(a), and in particular the requirement that fiduciaries act "for the exclusive purpose" of benefitting plan participants, *id.* § 1104(a)(1)—is a substantive analog to a parallel obligation in the Tax Code requiring trust assets to be used for the "exclusive benefit" of participants, 26 U.S.C. § 401(a)(2). Plaintiff fails to explain how meaningful daylight could exist between when trust assets are "used for … purposes other than for the exclusive benefit of" employees under the Tax Code and when fiduciaries are acting "for the exclusive purpose" of providing benefits to participants under ERISA. If the Treasury Department has concluded that using forfeitures to reduce employer contributions is consistent with acting for "the exclusive benefit of" employees, then it makes no sense for that same act to run afoul of ERISA's analogous "exclusive purpose" provision.

Moreover, the benchmark for prudence under ERISA is acting "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." 29 U.S.C. § 1104(a)(1)(B). Plainly, those circumstances include acting in a way that one's federal co-regulator has said for decades is entirely appropriate. In other words, the permissibility of using forfeitures to offset employer contributions under the Tax Code helps inform whether such conduct is disloyal or imprudent under ERISA in the first place.

Indeed, Plaintiff's theory that Wells Fargo violated ERISA by doing *precisely* what the Treasury Department permits not only flips longstanding practice on its head, but also runs headlong into ERISA § 514(d). Section 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). This provision makes "'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 of Currency of U.S.*, 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.

Courts have repeatedly applied this principle to reject alleged ERISA violations. In *First National Bank of Chicago*, for example, the Seventh Circuit held that a defendant could not violate ERISA by complying with a regulation promulgated by the Office of the Comptroller of the Currency. *Id.* (citing 29 U.S.C. § 1144(d)). Likewise, while ERISA's anti-inurement rule might be interpreted to prohibit the return of contributions to a debtor's estate in certain circumstances, bankruptcy courts have nevertheless held that they can authorize such a return so long as the Bankruptcy Code permits it. *See In re Pulaski Highway Express, Inc.*, 41 B.R. 305, 309 (Bankr. M.D. Tenn. 1984) (rejecting the argument that ERISA's anti-inurement rule "is an exception to the unambiguous language of" § 1144(d)). As one court explained in rejecting an anti-inurement challenge, "[t]he language of § 1144(d) could be no clearer: *nothing* in ERISA should be interpreted to impact other federal law." *Id.*

DOL has also repeatedly invoked § 514(d) when interpreting ERISA. For example, DOL has 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)." U.S. Dep't of Lab. Advisory Op. No. 79-90A, 1979 WL 7027, at *3 (Dec. 28, 1979). Section 404(a)(1) is, of course, ERISA's fiduciary-breach provision—the same one Plaintiff invokes here. *See* 29 U.S.C. § 1104(a)(1).[4]

Section 514(d) likewise protects Wells Fargo's treatment of forfeitures. Forfeitures of non-vested employer contributions are governed by the Tax Code, in addition to ERISA. *See generally* 26 U.S.C. § 411; *see supra*, pp. 6-8. As discussed above, a Treasury Department regulation governing defined-benefit pension plans states that forfeitures "must be used as soon as possible to reduce the employer's contributions under the plan." 26 C.F.R. § 1.401-7(a); *see supra*, pp. 9-10. Plaintiff's forfeiture theory—which is in no way cabined to defined-contribution plans—would abrogate this regulation by tying employers' hands and requiring them to use forfeitures to offset plan expenses. Moreover, the Treasury Department has consistently applied 26 C.F.R. § 1.401-7(a) in the context of defined-contribution plans. *See supra*, pp. 9-10. In the exact context of this case, then, Plaintiff's theory would contravene the regulatory authority allowing forfeitures to be used to decrease employer contributions, in direct violation of § 514(d). *See First Nat'l Bank of Chi.*, 956 F.2d at 1368. Thus, the fundamental inconsistency between Treasury

[4] For a helpful ERISA/U.S. Code cross-reference guide, see https://bit.ly/4eubbf4.

Department regulations and Plaintiff's theory renders Plaintiff's theory not just implausible in light of historical practice, but in clear conflict with § 514(d).

* * *

The consistent understanding of Congress and the Treasury Department, including the Treasury Department's proposed clarifying regulation, explicitly authorizes the very practice that Plaintiff challenges. In light of this context, the vast majority of district courts tasked with resolving the recent wave of forfeiture actions have rejected theories similar to Plaintiff's as implausible, leading to grants of motions to dismiss. *See, e.g.*, *Madrigal v. Kaiser Found. Health Plan, Inc.*, No. 24-cv-5191, 2025 WL 1299002, at *4-7 (C.D. Cal. May 2, 2025) (explaining that the plaintiff's similar forfeiture theory "marks a significant departure from previously well-settled law"); *see also Hernandez v. AT&T Servs., Inc.*, No. 25-cv-676, 2025 WL 3208360, at *4 (C.D. Cal. Nov. 14, 2025); *Polanco v. WPP Grp. USA, Inc.*, No. 24-cv-9548, 2025 WL 3003060, at *3-9 (S.D.N.Y. Oct. 27, 2025); *McWashington v. Nordstrom, Inc.*, No. 24-cv-1230, 2025 WL 1736765, at *12-16 (W.D. Wash. June 23, 2025); *Wright v. JPMorgan Chase & Co.*, No. 25-cv-525, 2025 WL 1683642, at *3-7 (C.D. Cal. June 13, 2025), *appeal docketed*, No. 25-4235 (9th Cir. July 9, 2025); *Bozzini v. Ferguson Enters. LLC*, No. 22-cv-5667, 2025 WL 1547617, at *2 (N.D. Cal. May 29, 2025); *Sievert v. Knight-Swift Transp. Holdings, Inc.*, 780 F. Supp. 3d 870, 878 (D. Ariz. 2025); *Hutchins v. HP Inc.*, 767 F. Supp. 3d 912 (N.D.

Cal. 2025), *appeal docketed*, No. 25-826 (9th Cir. Feb. 7, 2025). This Court should do the same.

II. Plaintiff's forfeiture claims fail.

The Plan gives Wells Fargo three options for how to use forfeitures: (1) offset employer contributions; (2) pay expenses of the Plan; or (3) make corrective adjustments to participants' accounts. Plaintiff contends Wells Fargo breached its fiduciary duties by choosing the first option. That is incorrect: Wells Fargo's adherence to the Plan documents and longstanding historical practice does not breach any fiduciary duty. Nothing in ERISA requires plan participants to receive *more* than they were contractually promised, and that is all Plaintiff complains of.

A. ERISA does not require plan sponsors to provide any particular level of benefits.

ERISA does not require employers to offer a retirement plan, and nothing in "ERISA mandate[s] what kind of benefits employers must provide if they choose" to sponsor a benefit plan. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *see also Crown v. Union Pac. R.R. Co.*, 44 F. App'x 44, 45-46 (8th Cir. 2002) ("ERISA does not require employers to offer any particular kind of benefit. It simply requires them to pay whatever benefits it has promised. . . ."). Those decisions are "unreviewable matter[s] of plan design." *Mitchell v. Blue Cross Blue Shield of N.D.*, 953 F.3d 529, 540 (8th Cir. 2020). Employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate" employee benefit plans.

Lockheed, 517 U.S. at 890 (citation omitted). As a result, employees cannot use fiduciary liability to force an employer "to contribute more to the Plan than it" did. *Loomis v. Exelon Corp.*, 658 F.3d 667, 671 (7th Cir. 2011), *abrogated on other grounds as recognized in Hughes v. Nw. Univ.*, 63 F.4th 615, 624 (7th Cir. 2023). In other words, employers cannot be held liable under ERISA on the basis that they did not make a retirement plan "more valuable to participants." *Id.* Rather, "[w]hen deciding how much to contribute to a plan, employers may act in their own interests." *Id*.

Critically, these principles do not immunize an employer from liability for failing to provide employees with the benefits they have been promised. Once an employer has decided to sponsor a plan, employees can "rel[y] on the face of written plan documents" to "protect contractually defined benefits." *US Airways, Inc. v. McCutcheon*, 569 U.S. 88, 100-101 (2013) (identifying "ERISA's principal function" as the "protect[ion]" of contractual benefits) (citations omitted); *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985). Thus, where a plaintiff objects to the level of benefits he received, the basis for liability must derive from the plan documents, rather than general principles of fiduciary liability.

Applying these principles here, Plaintiff's claim has no legal basis. Whether forfeitures are used to reduce employer contributions is a decision regarding how much an employer is obligated to contribute and how much employees owe in expenses—and those decisions cannot give rise to liability under ERISA. Plaintiff would presumably agree that he could not raise a cognizable claim that Wells Fargo violated its fiduciary duty by declining to make, on a discretionary basis, employer contributions that are not promised by the terms of the Plan. But, again, his current theory seeks to accomplish precisely that: namely, requiring the employer to pay fees and expenses that the employer never promised to cover or to make bonus payments to individual participants beyond what the Plan provides. Plaintiff should not be able to use forfeitures as an end-run to accomplish indirectly what he could not accomplish directly. *See Loomis*, 658 F.3d at 671 (rejecting a theory that would require the plan sponsor "to contribute more to the Plan than it does").

Notably, DOL agrees. DOL recently made clear that an employer's "deci[sion] to use Plan forfeitures to fund matching contribution benefits" does not state a plausible claim for breach when permitted by the plan documents. Br. for the U.S. Sec'y of Lab. as *Amicus Curiae* Supporting Defendant-Appellee at 15, *Hutchins v. HP Inc.*, No. 25-826 (9th Cir. July 9, 2025), ECF No. 24. As DOL's brief explains, "it is axiomatic that 'ERISA does no more than protect the benefits which are due to an employee under a plan.'" *Id.* at 17 (quoting *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1100 (9th Cir. 2004)). Thus, where a plaintiff has "no allegation" that he received "less than the full contribution promised to him by [the employer] under the Plan," the plaintiff has failed to state a claim for breach of fiduciary duty. *Id.* at 17-18.

B. Plaintiff's theory of discretion undermines his own position and is internally inconsistent.

Plaintiff's theory of fiduciary liability advances logically irreconcilable positions: On the one hand, he contends that the reason ERISA's fiduciary obligations are triggered is that the Plan document provides Wells Fargo with *options* (*i.e.*, *discretion*) about how to allocate forfeitures. Opening Br. 44-47. On the other hand, to dissuade the Court from examining the Plan document to see whether Plaintiff is accurately characterizing it, Plaintiff argues that Wells Fargo "cannot invoke plan text to excuse fiduciary breaches." Opening Br. 48. These positions are incoherent and, if anything, reveal the fundamental flaws in Plaintiff's legal theory.

1. As Plaintiff first explains it, because the Plan provided Wells Fargo with *options* for reallocating forfeitures, Wells Fargo was required to select the option that would, in Plaintiff's view, benefit him personally. Under this approach, Wells Fargo could have treated forfeitures in *precisely the same way* if it had simply tweaked the Plan document to eliminate flexibility—but, once it provided the Plan with *options* for allocating forfeitures, it was in fact limited to the subset of options that Plaintiff believes would benefit him personally rather than using the forfeitures to provide employer contributions to Plan participants.

That makes no sense for a number of reasons. First, this argument suggests that the problem Plaintiff identifies is not about the exercise of any *actual* fiduciary discretion but a quibble with how the Plan was written—in other words, that a change in wording could somehow flip the switch on fiduciary liability. But this argument is completely contrary to the position consistently taken by ERISA plaintiffs, who frequently point to the directive in 29 U.S.C. § 1104(a)(1)(D) that fiduciaries must discharge their fiduciary obligations "in accordance with" the plan document "insofar as" the plan document is "consistent with the provisions of this subchapter." *See also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014) ("the duty of prudence trumps the instructions of a plan document"). Indeed, that is precisely what Plaintiff says elsewhere in his brief. Opening Br. 48. Doctrinally, it makes little sense to suggest that Wells Fargo has a fiduciary obligation to use contributions in a particular way *but* that a plan sponsor can effectively override that obligation by writing the plan document differently.

Second, this theory effectively faults Plan fiduciaries for following the Plan as written, rather than unilaterally *rewriting the Plan* to require forfeitures to be used in a way that provides participants with more benefits than they were promised (*i.e.*, to subsidize their individual investment-management expenses). But the writing of a plan document is indisputably a *settlor* function, not a fiduciary one. *See Lockheed*, 517 U.S. at 890 (recognizing that employers "are analogous to the settlors of a trust" when they act to "adopt, modify, or terminate" employee benefit plans) (citation omitted); *see also Coulter v. Morgan Stanley & Co.*, 753 F.3d 361, 367 (2d Cir. 2014) (explaining that "non-fiduciary duties generally include 'decisions relating to the timing and amount of contributions'") (citation omitted). Moreover, "ERISA seeks to ensure that, if an employer promises retirement benefits to employees, they will actually receive those benefits," but it does not require them to promise or fund particular benefits in the first place. *Schultz v. Windstream Commc'ns, Inc.*, 600 F.3d 948, 951 (8th Cir. 2010). Accordingly, "ERISA's fiduciary duty requirement simply is not implicated where [an employer] makes a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). Indeed, the whole purpose of the settlor-fiduciary distinction is that an employer is *not* subject to fiduciary liability arising from plan design decisions if it adheres to the contractual benefits it promised to participants. It would eviscerate the settlor function if—as Plaintiff contends, *see* Opening Br. 46—an employer could nonetheless be sued for following the terms of the plan it put into place. And the notion that fiduciaries commit breach by not finding ways to provide participants with *more* benefits than they were promised (*e.g.*, employer-subsidized investment-management expenses) has no foundation in ERISA.

Third, there are many sound reasons *why* plan documents provide choices about how to use forfeitures—including the option to apply them to employer contributions. For one thing, retirement plans governed by the Tax Code (which most retirement plans are, *see supra*, pp. 6-8) have long understood that they are not permitted to keep unallocated forfeitures sitting in plans; instead, the Treasury Department instructs plans to use or allocate forfeitures "in the plan year incurred," or else they can lose their "qualified" status (*i.e.*, their eligibility for significant tax benefits). *Retirement News for Employers* 4; *see also* Rev. Rul. 80-155, 1980-1 C.B. 84, 1980 WL 130029, at *1 (June 16, 1980). At the same time, how best to use forfeitures can vary significantly from year to year in ways that cannot be predicted *ex ante*. Depending on how many employees leave in a given year before their benefits vest, what the current employer contribution levels are, when forfeitures arise, when employer contributions are made, the amount of administrative expenses, and when administrative expenses are due, it may make more or less sense to use forfeitures to fund administrative expenses, employer contributions, or corrective adjustments, for example. Plaintiff's theory would deprive plan sponsors of that flexibility.

2. Plaintiff's categorical argument—that Wells Fargo committed an actionable fiduciary breach even if the Plan document does *not* vest Wells Fargo with discretion about how to use forfeitures (Opening Br. 48)—does not make sense

either. If ERISA *always* requires funds to be used to increase participant benefits, then ERISA would *require* plan fiduciaries to disregard the plan document and *always* use forfeitures to offset participants' share of expenses or to make additional payments to participants in order to avoid committing a fiduciary breach. That approach cannot be squared with § 514(d), *see supra*, pp. 13-15. It flies in the face of longstanding practice and consistent guidance from DOL, Treasury, and Congress. *See supra*, pp. 5-16. And as explained below, it would be an exceedingly odd rule to divine from a statute that vests employers with the *non*-fiduciary, settlor power to decide what benefits to provide, and how to allocate plan expenses among the employer and plan participants. *See infra*, pp. 24-26.

In short, Plaintiff has no doctrinally coherent justification for his theory of liability.

C. Plaintiff's approach cannot be squared with Congress's objectives in enacting ERISA.

Plaintiff repeatedly trumpets ERISA's fiduciary provisions—and in particular the "exclusive purpose" language in 29 U.S.C. § 1104(a)(1)(A)—as directing a ruling in his favor. But that provision requires fiduciaries to act "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." Allocating forfeited employer contributions to participant accounts—*i.e.*, using them *to provide plan benefits*—is fully consonant with those obligations, and with the concept of acting "solely in the interest of the participants." *See Hughes*, 525 U.S. at 442 (ERISA's "exclusive purpose" language "focuses exclusively on whether fund assets were used to pay pension benefits to plan participants"); *cf. Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 22 (2004) ("The [anti-inurement] provision demands only that plan assets be held for supplying benefits to plan participants.").

Nothing in ERISA's directive that fiduciaries act to "defray[] reasonable expenses of administering the plan" compels a different conclusion. That provision requires that fiduciaries keep costs or expenses for the plan as a whole at a "reasonable" level; it does not require fiduciaries to ensure that participants have *no* costs, or that the *plan sponsor* shoulder any particular expenses, let alone optional expenses associated with higher-fee investment options or services that only a select group may need to use, such as qualified domestic relations orders or loan processing. *See Loomis*, 658 F.3d at 671 ("ERISA does not create any fiduciary duty requiring employers to make pension plans more valuable to participants" by paying plan expenses). To the contrary, ERISA exists to protect the benefits promised under the Plan, not to create a substantive right to new benefits that were never promised. *See supra*, pp. 17-22. Plaintiff does not dispute that he received precisely the benefits he was promised. His failure to receive *additional* benefits is not a violation of ERISA.

Moreover, Plaintiff's theory undercuts the flexibility Congress afforded plan sponsors who offer retirement plans. As discussed above, ERISA does not impose any obligation on employers to offer a particular level of benefits, or even to offer benefits at all. *See Lockheed*, 517 U.S. at 887. Thus, an employee's entitlement to benefits is a "contractually defined" right that is protected by the "written plan documents." *US Airways*, 569 U.S. at 100-101 (citations omitted). Plaintiff's theory here, however, is that even if plan participants get every benefit and every penny they are promised by the plan documents, ERISA's fiduciary provisions require plans to be interpreted in a way that would entitle participants to *more* benefits than they have been promised—here, free (or highly subsidized) plan expenses. That makes no sense and is completely inconsistent with Congress's objective.

III. Plaintiff's theory harms both employers and employees.

Interpreting ERISA to give rise to fiduciary obligations that Congress and regulators have *never* understood to exist also would disrupt the settled expectations of plan sponsors. It would impose "gotcha" liability on plan sponsors who simply incorporated a Treasury regulation into their plan documents—over 65 of whom have been sued thus far[5]—simply because they did not use whatever magic words Plaintiff suggests could have enabled them to avoid a lawsuit.

[5] *See* Groom Law Group, 401(k) Plan Forfeitures – the Department of Labor Backs Employers in Arguing that Lawsuit Should Be Dismissed (July 14, 2025), https://bit.ly/4p9nhin.

Critically, Plaintiff's theory also undercuts the flexibility that Congress deliberately (and sensibly) afforded to plan sponsors who decide to offer retirement plans. As the Supreme Court has explained, when enacting ERISA Congress knew that if it adopted a system that was too inflexible or "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering … benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *see also Russell*, 473 U.S. at 148 n.17 ("Congress was concerned lest the cost of federal standards discourage the growth of private pension plans."). Plaintiff's theory would have precisely that effect—discouraging employers from promoting employee well-being by creating benefit plans and offering "match" contributions to incentivize employees' continued service. Despite the lack of harm to employees from the use of forfeitures at issue in this and similar lawsuits, the repercussions of this litigation *will* ultimately harm employees in the future.

* * *

Plaintiff's inherently contradictory theory illustrates the broader failings of the recent wave of forfeiture lawsuits. *See* Response Br. 3-4. Plaintiff cannot show harm from Wells Fargo's treatment of forfeitures because Wells Fargo already covers administrative expenses for the Plan. Yet Plaintiff is nevertheless attempting to twist Wells Fargo's decision to *benefit* Plan participants (by generously covering *Plan* administrative expenses and making employer contributions) into the basis for a lawsuit by suggesting that Wells Fargo could have used forfeitures to make extra payments to participants or to cover fees beyond the Plan's expenses. Nothing in the Plan entitles Plaintiff to that windfall, and nothing in ERISA entitles Plaintiff to rewrite the Plan so that it provides even *more* benefits to participants.

At the end of the day, Plaintiff's theory has nothing to recommend it. It will not result in any meaningful benefit to employees, and it is inconsistent with ERISA, historical practice, and employers' settled expectations. The Court should reject this novel claim.

CONCLUSION

The judgment of the district court should be affirmed.

November 26, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,360 words, excluding the parts exempted by Rule 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

Dated: November 26, 2025

s/ Jordan Bock
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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2025, I electronically filed the foregoing using the Court's CM/ECF system.

<u>s/ Jordan Bock</u>
Jordan Bock