No. 24-5045

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURTNEY MCMILLIAN and ROBERT COOPER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

X. CORP., F/K/A TWITTER, INC., X HOLDINGS, ELON MUSK, DOES,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Northern District of California
Case No. 3:23-cv-03461-TLT

BRIEF FOR THE ACTING U.S. SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Acting United States Secretary of Labor ("Secretary") has the primary authority to interpret and enforce Title I of the Employee Retirement Income Security Act of 1974 ("ERISA" or the "Act") and is responsible for "assur[ing] the . . . uniformity of enforcement of the law under the ERISA statutes." *See Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 691-93 (7th Cir. 1986) (en banc). To that end, the Secretary has an interest in effectuating ERISA's express purpose of "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" and "providing for appropriate remedies . . . and ready access to the Federal courts." *See* 29 U.S.C. § 1001(b).

Here, Plaintiffs allege that Twitter, Inc.'s[1] Severance Plan ("Severance Plan" or "Plan") is an employee benefit plan under ERISA and that they, along with the putative class members they represent, were owed certain benefits under the Plan following their involuntary terminations from Twitter. The district court incorrectly held that the Plan did not entail enough "particularized discretion" to be an "employee benefit plan" as defined by ERISA and subsequently dismissed Plaintiffs' Amended Complaint. The Secretary has a substantial interest in ensuring

[1] Defendant Elon Musk ("Musk") purchased Twitter on October 27, 2022. ER-55 ¶ 54. Following Musk's acquisition, Twitter merged into X Corp. in March 2023. ER-4 n. 1. The Secretary's Brief refers to both Twitter and X Corp. as "Twitter" unless otherwise noted.

that additional, extra-statutory hurdles are not placed on workers seeking to vindicate their promised benefits under ERISA.

The Secretary thus files this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE CASE

A. Factual Background

Plaintiffs Courtney McMillian ("McMillian") and Ronald Cooper ("Cooper") were employees of Twitter until their involuntary terminations following Elon Musk's acquisition of the company in October 2022. ER-48 ¶¶ 5-6; ER-49 ¶¶9-10. McMillian worked at Twitter as the Head of People Experience from August 2020 until her termination effective January 4, 2023. ER-48 ¶ 5. Cooper, a Workplace Operations, Facilities, and People Manager, joined Twitter in June 2021 and worked there until his termination on April 28, 2023. ER-48 ¶ 6. Both McMillian and Cooper were terminated as part of "widespread layoffs" by Musk after he acquired Twitter. ER-55 ¶ 55.

Twitter's Severance Plan was established in or before 2019 to provide benefits to employees who were involuntarily terminated from the company. ER-51 ¶ 27. Under the Plan, an eligible employee, upon termination, could expect "payments based on employee salary, tenure, job level, department, and reason for departure; a payment for health insurance continuation; pro-rated bonuses for

certain types of employees; payments for RSUs [Restricted Stock Units]; and outplacement services." ER-52 ¶ 30. The Plan terms were memorialized in various documents created and maintained by Defendants, including a "Plan Matrix, which Twitter used to determine an employee's eligibility for severance, and the amount and type of severance an eligible employee would receive." ER-51 ¶¶ 27-28.

Under the Plan Matrix, determining an employee's eligibility for severance and the amount of severance paid required a detailed investigation into an employee's history at Twitter. ER-51 ¶ 29. Specifically, the Plan required Twitter to consider "the reason for the [employee's] departure, an employee's tenure at the company, job level, department, [RSU] issuance and price of RSUs at the time of departure, whether the employee's departure entailed any legal risk for the company, and other factors" before determining eligibility or paying out benefits to terminated employees. *Id.* Employees from Twitter's Human Resources department and a few employees from various other Twitter teams were responsible for processing claims for severance benefits. ER-52 ¶¶ 33-34. To keep track of the multiple variables involved in determining severance benefits, Twitter's Human Resources employees "created and used templates and spreadsheets to process claims for benefits under the Plan." ER-52 ¶ 33.

The Severance Plan "was in effect for the entire duration of [McMillian's and Cooper's] employment with Twitter[,]" including when Musk bought Twitter

on October 27, 2022. ER-52 ¶ 37. On numerous occasions "Twitter assured employees that the Plan benefits would continue" post-acquisition. ER-52 ¶ 38. Twitter made these assurances in company-wide FAQs on three occasions—in April, June, and October 2022—and executives repeated these assurances during company-wide meetings and in an email to all Twitter employees in May 2022. ER-52 ¶ 38; ER-53 ¶¶ 39, 42; ER-54 ¶¶ 44, 48. In addition, the Twitter-Musk Merger Agreement stated that Twitter and Musk agreed to continue providing "[s]everance payments and benefits . . . no less favorable than" those provided under Twitter's pre-acquisition Severance Plan for one year following the closing of the merger. ER-53 ¶ 41. Former Twitter executives informed employees of this term the same day the merger was announced, ER-53 ¶ 42, and referenced the term in the October 2022 merger FAQ, ER-54 ¶ 48. According to Plaintiffs, Defendants never "inform[ed] employees of any anticipated changes to the Severance Plan." ER-56 ¶ 58.

Upon Musk's acquisition of Twitter, "Musk dismissed Twitter's executive leadership and Board of Directors, and Defendant Musk became the sole director and CEO of the company." ER-55 ¶ 54. Musk then initiated "widespread layoffs," which occurred in November 2022, twice in December 2022, and in February

2023. ER-55 ¶ 55.[2] McMillian and Cooper were terminated as part of these layoffs. Plaintiffs allege that under the Severance Plan they were entitled to more than six months of pay, "a lump sum payment equal to the cost of six months of continuing health insurance coverage, six months of outplacement services, and the value of any RSUs that vested within six months of [their] termination[s], in addition to any [prorated] bonuses." ER-58 ¶¶ 76, 78. Instead, Twitter offered Plaintiffs just one month of pay as their severance benefit. ER-58 ¶¶ 77, 79. Plaintiffs allege about 6,000 Twitter employees were terminated since Musk acquired the company in October 2022, ER-57 ¶ 70, and that Defendants have denied them Plan benefits, ER-58 ¶ 80.

B. Proceedings Below

Plaintiffs, on behalf of themselves and a class of similarly situated Plan participants and beneficiaries, filed suit in the United States District Court for the Northern District of California. ER-47 ¶ 1. The Amended Complaint alleges that the Severance Plan is an "employee welfare benefit plan" governed by ERISA, and that "Defendants failed to pay [class members] the promised severance benefits they were entitled to under the Plan." ER-51 ¶ 27; ER-57 ¶ 71. Plaintiffs assert four claims for relief under ERISA: (1) wrongful denial of benefits due under the Plan,

[2] The Amended Complaint indicates that "smaller mass firings" have continued. ER-55 ¶ 55.

ER-61-63 ¶¶ 89-109; (2) breach of fiduciary duty based on Defendants' failure to adequately fund the Plan, ER-64 ¶¶ 110-115; (3) breach of fiduciary duty based on Defendants' misleading communications about the Plan, ER-65-67 ¶¶ 116-131; and (4) breach of fiduciary duty based on Defendants' failure to monitor the conduct of other Plan fiduciaries, ER-67 ¶¶ 132-140. Among other remedies, Plaintiffs seek Defendants' compliance with the terms of the Severance Plan for "[a]ll participants and beneficiaries of the Plan who were terminated from Twitter since the date of Defendant Musk's takeover, October 27, 2022, through the date of judgment." ER-59 ¶ 82; ER-68 ¶¶ 141-42, 145, 150. Plaintiffs estimate monetary damages at $500 million, plus pre-judgment and post-judgment interest.. ER-68 ¶ 150.

Defendants moved to dismiss the Amended Complaint for failure to state a claim, which the district court granted. ER-3. The district court held that Twitter's severance policy, as alleged, was not an employee benefit plan under ERISA because it did not require an "ongoing administrative scheme." ER-17. The district court found the requisite administrative scheme lacking because "Twitter paid and offered to pay severance payments based on basic employment criteria that involved mathematical calculations, which does not involve a 'case-by-case' analysis or 'discretionary application' of the Twitter severance benefits' terms." ER-18 (quoting *Golden Gate Rest. Ass'n v. City & Cty. of S.F.*, 546 F.3d 639, 651

(9th Cir. 2008)). Though the Amended Complaint alleges that severance benefits were based in part on "legal risk," the district court reasoned that because Twitter's communications to terminated employees following Musk's takeover "did not include statements" regarding this component, "it is not reasonable for the Court to infer that the litigation risk component" was part of the Plan post-merger, and thus, did not need to factor into the court's analysis. ER-22-23. The district court therefore concluded that "there are insufficient facts alleged in the operative complaint that the putative ERISA plan is an 'ongoing administrative scheme' so that it would be ERISA governed." ER-25. Plaintiffs appealed.

SUMMARY OF THE ARGUMENT

The Amended Complaint adequately alleges that Twitter's severance policy qualifies as an ERISA plan. In holding otherwise, the district court reasoned that because Twitter's severance policy, as alleged, uses "set formulas" and "mathematical calculations" that can be applied without any "particularized discretion," Twitter's policy does not require an "ongoing administrative scheme" to implement—a condition for ERISA-plan status under *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987)—and thus is not an ERISA "plan." *See* ER-17. But the Supreme Court in *Fort Halifax* made clear that a policy like Twitter's that pays "ongoing benefits on a continuous basis" necessarily requires an ongoing administrative scheme; indeed, it is this ongoing need to pay benefits that "makes a

plan a plan." 482 U.S. at 14 n. 9 The Court in *Fort Halifax* made no mention of "plan" status turning on any threshold degree of discretion needed to pay benefits.

While the district court purported to draw its "particularized discretion" requirement from Ninth Circuit precedent, this Court too has *never* deemed "particularized discretion" a universal requirement for ERISA-plan status. Rather, to the extent this Court has invoked "particularized discretion" in the plan-status analysis, it has only been where the policy in question is somehow limited in either scope, duration, or timing of payment, and thus does not otherwise bear the traditional hallmarks of an "ongoing administrative scheme" under *Fort Halifax*. In those instances, a policy that requires a high degree of discretion in paying benefits may transform what would otherwise not qualify as an ERISA plan into a plan. But this Court has never said that a plan like Twitter's that pays benefits on an ongoing basis to multiple employees over time—the central feature of a "plan" under *Fort Halifax*—is nevertheless only a "plan" if the benefits criteria is sufficiently complicated as to entail some unspecified degree of "particularized discretion."

And for good reason, as such a requirement would cut a gaping hole in ERISA's protective web, leaving workers unprotected by ERISA merely because their plan—as countless do—pays benefits pursuant to "set formulas" and "mathematical calculations." Congress enacted ERISA to protect workers' benefits from financial abuse and mismanagement by their employers, and a simple policy

of paying benefits on an ongoing basis is no less of a "plan" deserving of ERISA's protections than a complex one. This Court should reverse the district court's decision below.[3]

ARGUMENT

I. The Amended Complaint Adequately Alleges the Existence of an Employee Benefit Plan Under ERISA

Title I of ERISA—which includes the statute's strict fiduciary standards—applies to any "employee benefit plan" established or maintained by an employer or an employee organization. 29 U.S.C. § 1003(a). An "employee benefit plan," in turn, is defined as "an employee welfare benefit plan or an employee pension benefit plan," or a plan that qualifies as both. 29 U.S.C. § 1002(3). And an "employee welfare benefit plan" is "any plan, fund, or program" established or maintained by an employer to provide participants and beneficiaries a variety of benefits described in section 186(c) of ERISA, including severance benefits. 29 U.S.C. § 1002(1)(B); *see* 29 U.S.C. § 186(c). Because there is no dispute that Twitter's severance policy, as alleged, was established by Twitter for its

[3] The Secretary takes no position on whether the Twitter Plan, as alleged, entails the requisite degree of "particularized discretion" to pass muster under the district court's incorrect standard. The Secretary simply contends that where a benefits policy, like Twitter's, pays benefits to multiple employees on an ongoing basis, it necessarily requires an "ongoing administrative scheme" sufficient to make it an ERISA "plan," regardless of the degree of discretion needed to calculate benefits.

employees, and that severance benefits can fall within ERISA's ambit,[4] the only question relevant to whether Twitter's severance policy qualifies as an "employee welfare benefit plan" at the pleading stage is whether the Amended Complaint plausibly alleges that it is a "plan, fund, or program." As explained below, the Amended Complaint plainly meets this burden.

A. The Requirement that a "Plan" Has an Ongoing Administrative Program is Met Where a Plan Pays Benefits on an Ongoing Basis

Because the term "plan" is "defined only tautologically in [ERISA]," *Fort Halifax*, 482 U.S. at 8, the criteria for determining whether an employer's benefit policy (severance or otherwise) qualifies as an ERISA "plan" has been fleshed out in the caselaw. In general, "[t]here are few formal requirements for the creation of an ERISA plan." *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 938 (9th Cir. 2003) (citing *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985), *abrogated on other grounds by Golden Gate*, 546 F.3d at 651). This Court has taken a two-fold approach: First, the employer's benefit policy must "enable reasonable persons to 'ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.'" *Winterrowd*, 321 F.3d at 939 (quoting *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc)).

[4] As the Supreme Court has made clear, "plans to pay employees severance benefits, which are payable only upon termination of employment, are employee welfare benefit plans within the meaning of [ERISA]." *Massachusetts v. Morash*, 490 U.S. 107, 116 (1989).

These criteria are commonly referred to as the "*Donovan* factors." Second, the policy must "invoke an 'ongoing administrative program.'" *Winterrowd*, 321 F.3d at 938 (quoting *Fort Halifax*, 482 U.S. at 12).

"Very few" policies will fail to satisfy the *Donovan* factors, "which require[] neither formalities nor elaborate details." *Winterrowd*, 321 F.3d at 939. The first factor—that benefits be ascertainable—does not require a formal plan document describing benefits, but rather can be met through something as informal as an employer's oral representation. *Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1442-43 (9th Cir. 1995); *see Scott*, 754 F.2d at 1503 (noting that "a written instrument is not a prerequisite to ERISA coverage"). Likewise, "[t]he class of beneficiaries rarely seems to be a contested issue when determining whether an informal ERISA plan exists." *Mance v. Quest Diagnostics Inc. Voluntary Separation Agreement Plan*, 237 F. Supp. 3d 217, 225 (D.N.J. 2017) (collecting cases); *see Kolkowski v. Goodrich Corp.*, 448 F.3d 843, 850 (6th Cir. 2006) ("intended beneficiaries" factor satisfied where severance policy provided benefits for "involuntarily terminated" employees). Regarding the source of financing, "the payment of benefits out of an employer's general assets does not affect the threshold question of ERISA coverage." *Williams v. Wright*, 927 F.2d 1540, 1544 (11th Cir. 1991); *see Fort Halifax*, 482 U.S. at 18 ("[A]n employer . . . should not be able to evade the requirements of the statute merely by paying . . . benefits out of general assets.").

Lastly, the "procedures for receiving benefits" may be satisfied by, for example, a letter from an employer stating that it would issue checks monthly to cover prescribed benefits. *See Williams*, 927 F.2d at 1544-45.

The second requirement for "plan" status—and the one at issue here—is that the benefits policy must "require[] an ongoing administrative program" to qualify as an ERISA "plan." *Fort Halifax*, 482 U.S. at 12. This requirement stems from the Supreme Court's decision in *Fort Halifax*, where the Court examined whether ERISA preempted "a Maine statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing." *Id.* at 3. In answering that question, the Court assessed whether the Maine law required employers to create ERISA plans. The Court noted that ERISA pertains to "plans, rather than simply benefits," *id.* at 12, and that a "plan" necessarily "presumes that *some type of administrative activity* is taking place," *id.* at 15 (emphasis added). Thus, the line demarcating "benefits" from "plans" to provide those benefits is whether the policy in question requires an "administrative scheme" to implement.

Applying that principle, the Court reasoned that because the Maine statute required only a "one-time, lump-sum payment triggered by a single event," it did not require any "administrative scheme" to implement. *Id.* at 12. The "employer assume[d] no responsibility to pay benefits on a regular basis" and "face[d] no periodic demand on its assets that create[d] a need for financial coordination and

control." *Id.* In the event of a plant closure, satisfying the Maine law "involve[d] only making a single set of payments to employees at the time the plant closes," after which "the employer has no further responsibility." *Id.* This "theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits." *Id.* For these reasons, the Court concluded that the Maine law did not require the creation of an ERISA plan, and thus was not preempted by the Act. *Id.* at 6.

But the Court in *Fort Halifax* made clear that where an employer pays benefits on an ongoing basis—as opposed to a one-time event—such an arrangement *necessarily* requires an ongoing administrative program to implement. As the Court explained, "[t]he obligation imposed by the Maine statute . . . differs radically in impact from a requirement that an employer pay ongoing benefits on a continuous basis." *Id.* at 14. Even plans that pay benefits in single lump-sum amounts, as in a death benefit plan, while "represent[ing] a one-time payment from the perspective of the beneficiaries," still require employers to make "regular payments to survivors on an ongoing basis." *Id.* at 14 n. 9. "The ongoing, predictable nature of this obligation creates the need for an administrative scheme to process claims and pay out benefits, whether those benefits are received by beneficiaries in a lump sum or on a periodic basis." *Id.* In short, the need to make ongoing payments to multiple beneficiaries over time "makes a plan a plan." *Id.*

B. By Alleging that Twitter's Severance Policy Pays Benefits on an Ongoing Basis, the Amended Complaint Adequately Pleads that the Policy Qualifies as an ERISA Plan

Applying the principles above, the Amended Complaint adequately alleges that Twitter's severance policy is an employee benefit plan under ERISA. First, Twitter's severance policy, as alleged in the Amended Complaint, easily satisfies the *Donovan* factors because a reasonable person could "ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *Donovan*, 688 F.2d at 1373. The Amended Complaint clearly alleges that the subject benefits are severance benefits, *see* ER-52 ¶ 30; that the intended beneficiaries are Twitter employees facing termination of employment by the company, *see* ER-52 ¶ 38; that the Plan was funded with "company [i.e., Twitter] funds," ER-52 ¶ 36; and that the procedure for receiving benefits was simply to be terminated by Twitter—at which point the former employee automatically became eligible for severance benefits and would automatically receive such benefits, *see* ER-52 ¶ 38; ER-54 ¶ 48.

The Amended Complaint also adequately alleges an "ongoing administrative program" to implement the Plan, consistent with *Fort Halifax*. Twitter allegedly "maintained a policy of paying regular severance benefits for many years," starting in at least 2019. ER-47 ¶ 2. This required Twitter to assign employees from several departments to administer the severance scheme and process claims, and to

outsource work to third-party service providers (*e.g.*, "outplacement services to departing employees"). ER-52 ¶¶ 31, 33-34. And because the Plan was funded by Twitter, the company's "administration of the Plan required regular, ongoing expenses of company funds." ER-52 ¶ 36; *cf. Fort Halifax*, 482 U.S. at 12. The Plan did not pay benefits pursuant to a one-time event (such as a plant closure). *Fort Halifax*, 482 U.S. at 14. Instead, Twitter assumed the responsibility to pay benefits on a regular basis as employees were terminated. *Cf. id.* at 12. In sum, the Amended Complaint sufficiently alleges that Twitter's severance policy—which paid benefits on an ongoing basis to employees as they were terminated—had the exact characteristics of a "plan" that the Supreme Court found absent in *Fort Halifax*.

II. The District Court Erred in Requiring Plaintiffs to Plead Particularized Discretion to Show the Existence of an ERISA Plan

The district court dismissed the Amended Complaint because it found "insufficient facts alleged in the operative complaint that the putative ERISA plan is an 'ongoing administrative scheme' so that it would be ERISA governed." ER-25. Invoking Ninth Circuit caselaw, the district court explained that because Twitter's severance policy, as alleged, uses "set formulas, or mathematical calculations of severance benefits, to be paid at one point in time without any 'ongoing particularized discretion,'" the Amended Complaint's allegations "do not show that Plaintiffs adequately pled an ongoing administrative scheme." ER-17

(citing *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d 1313 (9th Cir. 1997)). The district court's "particularized discretion" requirement for plan status—even where benefits are paid on an ongoing basis to multiple employees, as with Twitter's severance policy—has no grounding in ERISA or a proper understanding of Supreme Court or Ninth Circuit precedent. It would also substantially undermine ERISA's protections, as countless plans use "set formulas" and "mathematical calculations" to pay benefits—plans that, under the district court's logic, would not be protected by ERISA at all.

A. A "Particularized Discretion" Requirement for ERISA-Plan Status Has No Basis in ERISA's Text or Supreme Court Caselaw

ERISA broadly defines "employee benefit plan" without reference to any threshold amount of discretion needed to pay benefits. *See* 29 U.S.C. § 1002(1)(B), 1002(3); *Fort Halifax*, 482 U.S. at 8 (explaining that "employee benefit plan" and "plan" are "defined only tautologically in the statute"). While ERISA requires all plans to "provide for one or more named fiduciaries" and to vest those fiduciaries with "authority to control and manage the operation and administration of the plan," 29 U.S.C. § 1102(a)(1)—essentially, to imbue them with discretionary authority, *see* 29 U.S.C. § 1002(21)(A)—this and other requirements imposed on plans are "not part of the definition of 'plan.'" *Scott*, 754 F.2d at 1503. Accordingly, the district court's "particularized discretion" requirement for ERISA-plan status has no basis in the Act's text.

Nor is it supported by caselaw. The Supreme Court in *Fort Halifax* made no mention of "particularized discretion" in outlining what qualifies as an "ongoing administrative program," explaining instead that what "makes a plan a plan" is an employer's "need to make regular payments . . . [to those eligible for benefits] on an ongoing basis." 482 U.S. at 14 n. 9 ("The [one-time] obligation imposed by the Maine statute thus differs radically in impact from a requirement that an employer pay ongoing benefits on a continuous basis."). Underscoring the point that ongoing benefit payments is the central determinant of "plan" status, the Court drew a contrast to two cases where "[t]here was no question" that the "employer had a plan." *See id.* at 17-18 (citing *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd sub nom. Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986), and *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320 (2d Cir. 1985), *summarily aff'd sub nom. Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986) (collectively "*Burlington* cases")). In the *Burlington* cases, the Court explained, "[t]he employer had made a commitment to pay severance benefits to employees as each person left employment," and [t]his commitment created the need for an administrative scheme to pay these benefits on an ongoing basis." *Fort Halifax*, 482 U.S. at 18 n. 10. Given the ongoing need to pay benefits, the Court declared "[t]here was no question in the *Burlington* cases . . . whether the employer had a 'plan.'" *Id.* at 18-19.

B. This Court Has Never Deemed "Particularized Discretion" a Requirement for ERISA-Plan Status Where Benefits Are Paid on an Ongoing Basis to Multiple Employees

While this Court has occasionally referred to "particularized discretion" in evaluating the ERISA-plan status of severance policies, properly understood, that requirement has been applied only to severance policies that are quite limited in scope and otherwise would *not* qualify as an ERISA plan due to the absence of an ongoing administrative scheme (like the one-time lump-sum severance policy in *Fort Halifax*). It has never deemed "particularized discretion" an absolute pre-requisite for ERISA-plan status, applying even where benefits are paid on an ongoing basis to multiple employees. In other words, while "particularized discretion," under this Court's caselaw, can be a factor that *might* tip into ERISA-plan status a benefits policy that does not otherwise bear the hallmarks of an ongoing administrative scheme referenced in *Fort Halifax* (like ongoing benefits payments), this Court has never deemed it a *sine qua non* for an ERISA plan.

For example, in *Bogue v. Ampex Corp.*—the original source of the district court's "particularized discretion" requirement—the policy at issue provided severance benefits for only 10 employees, "applied only contingently, *if* [the company] were sold, *and* if the employee were denied substantially equivalent work by the buyer," and was limited to a roughly 18-month term. 976 F.2d 1319, 1322 (9th Cir. 1992). This Court acknowledged that because of the policy's

"limited time frame, its contingency, and its one-time application to any affected employee," the argument that it is not an ERISA plan is "not without merit." *Id.* at 1322. But because the administrator, in paying benefits under the policy, "remained obligated to decide whether a complaining employee's job was 'substantially equivalent' to his pre-acquisition job," this Court found that carrying out the severance policy required "enough ongoing, particularized, administrative, discretionary analysis to make the program in th[at] case a 'plan.'" *Id.* at 1323. In other words, this Court in *Bogue* looked to "particularized discretion" only *after* concluding that the policy did not have the traditional hallmarks of an ongoing administrative scheme, like the ongoing benefits payments Plaintiffs allege were made under Twitter's Plan.

The severance policy in *Delaye v. Agripac, Inc.*, 39 F.3d 235 (9th Cir. 1994)—another decision from this Court that referenced discretion and was cited in the district court's order—also did not involve a policy like Twitter's that paid benefits to multiple employees on an ongoing basis. The "policy" there was nothing more than a single employment contract for a single employee that provided severance benefits according to "a straightforward computation of a one-time obligation." *Id.* at 237. This Court found that implementing this single contractual requirement did not require an "ongoing administrative scheme" and therefore did not rise to the level of an ERISA plan. *See id.* at 237-38. This Court

rejected plaintiff's efforts to analogize the contract to the similarly limited severance policy in *Bogue* (which the Court said was an ERISA plan), explaining that the *Delaye* policy did not require "particularized" discretionary decision-making to determine eligibility for benefits. *Id.* at 238. But again, as it did in *Bogue*, this Court in *Delaye* assessed "particularized discretion" only because it was confronted with a policy—really, a single contract—that did not pay benefits to multiple employees on an ongoing basis like the Twitter Plan, and thus did not otherwise look like a "plan" under *Fort Halifax.*

While the severance policy at issue in *Velarde v. PACE Membership Warehouse, Inc.*—a third Ninth Circuit case on which the district court relied—covered more employees than the one in *Delaye*, it was limited in *when* it paid out benefits. 105 F.3d at 1315. In *Velarde*, the employer promised severance benefits under a "stay-on letter" to certain employees if they continued to work through a predetermined date, when the warehouse in which they worked was set to be closed. *Id.* at 1315-17. This Court concluded that only a "modicum of discretion" was required to assess eligibility, namely whether an employee was terminated for cause and whether the employee performed their duties in a satisfactory manner. *Id.* Such minimal discretion did not "transform a simple severance agreement into an ERISA employee benefits plan." *Id.* But here again, the *Velarde* Court was not faced with a policy like Twitter's that paid benefits on an ongoing basis, but rather

one that paid benefits on a one-time, limited-scope basis. It was only in that context that this Court assessed whether the policy in *Velarde* entailed enough "particularized discretion" to nevertheless transform it into an ERISA plan.

This Court's decision in *Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 546 F.3d 639, also cited by the district court for its "particularized discretion" requirement, likewise did not involve an ongoing benefits regime like Twitter's—or anything close to it. ER-16. *Golden Gate* involved an ERISA preemption challenge to a local ordinance that required certain employers to make health care expenditures either to (or on behalf of) covered employees or directly to the City of San Francisco. 546 F.3d at 642-45. In holding that ERISA did not preempt the law's "City-payment option," this Court began by pointing out that "[t]he fact that an employer makes its payments to the City rather than to the employees confirms, if confirmation were needed, that the employer's administrative obligations under the City-payment option do not create an ERISA plan." *Id.* at 650. Further buttressing this Court's conclusion was the fact that employers' only obligations "involve[d] mechanical record-keeping" and did not require employers to make "subjective judgments" that involved "more than a modicum of discretion." *Id.* at 650-51. In context, this Court' reference to discretion as an *additional* reason that a cash payment to a city under a government mandate does not create an ERISA plan is no reason to impose that criterion on a

traditional employer-sponsored program to pay benefits to employees on an ongoing basis.

In sum, the district court got it wrong when it painted the "particularized discretion" criteria referenced in *Bogue*, *Delaye*, *Velarde*, and *Golden Gate* as a universal requirement for ERISA-plan status. Particularized discretion, through the lens of these cases, is better viewed as a factor that can potentially create an "ongoing administrative scheme" where the policy otherwise might not require one because, for example, it is limited in duration (*Bogue*), scope (*Delaye*), frequency of payment (*Velarde*), or because the payment is not paid directly to beneficiaries (*Golden Gate*). This Court has *never* held that even where a policy pays benefits directly to multiple employees on an ongoing basis over time—in other words, a policy that has the precise characteristics of an "ongoing administrative scheme" cited by the Supreme Court in *Fort Halifax*—it must still entail "particularized discretion" to qualify as an ERISA plan. Because the Plan as alleged here pays severance benefits directly to the multiple terminated employees covered by the policy on an ongoing basis, it necessarily requires an "ongoing administrative scheme" under *Fort Halifax* and thus qualifies as a "plan or program" for purposes of ERISA.

C. The District Court's Particularized Discretion Requirement Would Severely Undermine ERISA's Protections

Enshrining "particularized discretion" as a universal requirement for ERISA-plan status—aside from having no basis in the statute, *Donovan* factors, or *Fort Halifax*—would undermine ERISA's purpose of protecting participants' hard-earned benefits. "In enacting ERISA, Congress' primary concern was . . . failure to pay employee benefits from accumulated funds." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). To that end, Congress established statutory "requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator." *Id.*

Yet a rule that makes ERISA-plan status turn on the degree of "particularized discretion" required to implement it—essentially, the complexity of the benefits formula—would deprive workers of ERISA's protections merely because their benefits are easy to calculate. For example, a basic defined benefit pension plan that pays employees 80% of their salary in retirement would presumably not qualify as a plan under the district court's logic because it uses "set formulas, or mathematical calculations" to pay benefits and does not require "particularized discretion." ER-17. That cannot be, as ERISA is no less protective of simple benefit regimes than it is of complex ones. There is simply no basis to deprive participants of ERISA's protections and leave their benefits vulnerable to

financial abuse merely because their plans use "set formulas" and "mathematical calculations" as countless plans do.

Accordingly, this Court should correct the district court's imposition of artificial, extra-statutory requirements to Twitter's Severance Plan.

CONCLUSION

The Secretary respectfully requests that this Court hold that Plaintiffs adequately pleaded that the Twitter Severance Plan qualifies as an employee benefit plan under ERISA and reverse the district court's decision dismissing the Amended Complaint.

Respectfully submitted,

Date: November 1, 2024

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on this day, November 1, 2024, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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