IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT MacTAGGERT, on behalf of the Extreme Engineering Solutions, Inc. Employee Stock Ownership Plan, and on behalf of a class of all other persons similarly situated,

Plaintiff,

v.

PROFESSIONAL FIDUCIARY SERVICES, LLC; JOHN MICHAEL MAIER; ROBERT S. SCIDMORE; and BRET FARNUM,

Defendants.

Case No. 3:22-CV-00371-WMC

PLAINTIFF'S OPPOSITION TO DEFENDANTS
ROBERT S. SCIDMORE AND BRET FARNUM'S MOTION TO DISMISS

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Federal Rule of Evidence 406 12

I. INTRODUCTION

Defendants Robert S. Scidmore and Bret Farnum ("Seller Defendants") move to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Dkt. 21, "Motion"). Their Rule 12(b)(1) argument ignores the allegations of injury in the Complaint to the employee stock ownership plan (ESOP) at issue and to the individual accounts of the plan participants, including Plaintiff Scott MacTaggert, who were allocated employer stock purchased by the plan for more than fair market value. The Complaint contains the required "general factual allegations" of injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.") (cleaned up). The Motion misconstrues what a concrete injury is. The Complaint alleges monetary injury to the Plan and its participants, including Plaintiff, which occurred in the January 2019 stock purchase transaction and thereafter with allocations of company stock to the participants' individual Plan accounts. That is concrete injury. *See*, *e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) ("certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as … monetary harms. If a defendant has caused … monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.").

The frivolous Rule 12(b)(6) motion to dismiss Plaintiff's prohibited transaction claims asks the Court to defy two precepts. First, the ERISA § 406 prohibited transaction rules "bar categorically" certain transactions Congress found likely to injure a pension plan, such that a complaint alleging a § 406 transaction alleges a *per se* statutory violation. *See Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 160 (1993); *see also Harris Trust & Sav. Bank v.*

Salomon Smith Barney, Inc., 530 U.S. 238, 241–42 (2000); *Chesemore v. Alliance Holdings, Inc.*, 770 F. Supp. 2d 950, 965 (W.D. Wis. 2011). Second, defendants, *not* plaintiffs, bear burdens of pleading and proof on affirmative defenses, including the § 408 exemptions from the § 406 prohibitions, which the leading private company ESOP case from the Seventh Circuit confirms. *See Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 676 (7th Cir. 2016). Astonishingly, Defendants do not even mention *Allen*, let alone grapple with it, even though it both sets the standard for pleading a § 406 claim in an ESOP case and holds defendants bear the burden of pleading and proving the affirmative defenses thereto, principally the adequate consideration defense under ERISA § 408(e). Because Plaintiff indisputably pleads the elements of his § 406 claims and does not have to negate § 408 defenses, his claims are well-pled. Nearly 50 years after ERISA's adoption, these precepts cannot be legitimately questioned. Indeed, Seller Defendants' counsel's dubious theories have been rejected in a slew of ESOP cases in which courts held similar complaints stated plausible claims.[1] Under ERISA's plain terms and governing case law, this Court should as well.

In sum, the Complaint plausibly alleges the sole claim against Seller Defendants, Count IV, for the reasons stated below. The Court should deny the Motion in its entirety.

II. BACKGROUND

Plaintiff alleges a January 2019 "ESOP Transaction" in which the Extreme Engineering Solutions Inc., Employee Stock Ownership Plan (the "Plan") purchased, directly or indirectly, 100% of the shares of Extreme Engineering Solutions Inc. ("Extreme Engineering") for

[1] *See Threadford v. Horizon Tr. & Inv. Mgmt., N.A.*, No. 2:20-CV-00750, 2021 WL 5105330 (N.D. Ala. Oct. 29, 2021); *Blackwell v. Bankers Tr. Co. of S.D.*, No. 3:18-CV-141, 2019 WL 1433769 (S.D. Miss. Mar. 29, 2019); *Swain v. Wilmington Tr., N.A.*, No. 17–71, 2018 WL 934598 (D. Del. Feb. 16, 2018); *Innis v. Bankers Tr. Co. of S.D.*, No. 4:16-cv-00650, 2017 WL 4876240 (S.D. Iowa Oct. 13, 2017) (allowing § 406(a) claims); *see also McMaken v. GreatBanc Tr. Co.*, No. 17-cv-04983, 2019 WL 1468157 (N.D. Ill. Apr. 3, 2019) (motion to amend complaint).

$80,377,000 from "parties in interest" including two high-ranking Extreme Engineering officers and directors, the Seller Defendants, and potentially other selling shareholders unknown to Plaintiff (together, "Selling Shareholders"), and Extreme Engineering. (Complaint (Dkt. 1) ¶¶ 1, 5-6, 9, 19-22, 43, 45, 64). The ESOP Transaction was financed with a loan to the Plan from Extreme Engineering, which is a party in interest as the Plan's sponsor whose employees are covered by the Plan and as the fiduciary Plan administrator. *Id.* ¶¶ 5, 31-39, 43, 64, 65. The Plan is an employee stock ownership plan, a pension plan, and an individual account or defined contribution plan under ERISA. *Id.* ¶¶ 27, 28, 30. Plaintiff is a Plan participant who vested in Extreme Engineering shares allocated to his Plan account. *Id.* ¶¶ 2, 14, 44. Defendants Professional Fiduciary Services, LLC and its president John Michael Maier (together, the "Trustee") were ERISA fiduciaries and had sole fiduciary responsibility for determining the value of the stock on behalf of the Plan and sole authority to negotiate and approve the ESOP Transaction on the Plan's behalf. *Id.* ¶¶ 1, 3, 7, 17, 18, 41, 42, 67.

Plaintiff alleges the Trustee violated ERISA's prohibited transaction and fiduciary duty rules by approving the ESOP Transaction. Count I alleges three violations of ERISA § 406, 29 U.S.C. § 1106, by the Trustee in approving the stock and loan transactions between the Plan and parties in interest. (Compl. ¶¶ 63-71). Count II alleges the Trustee breached its ERISA § 404(a), 29 U.S.C. § 1104(a), fiduciary duties when it failed to appropriately and independently investigate the fair market value of the stock; failed to act independently and probe the projections and other information provided to it by Extreme Engineering management; and failed to negotiate for the Plan to pay no more than fair market value. (*Id.* ¶¶ 72-81). Count III alleges payment by Extreme Engineering, which the Plan owns, of the Trustee's damages, losses, legal fees and costs in this lawsuit under an indemnification agreement executed when Selling Shareholders owned the

company harms the Plan and violates ERISA's § 410, 29 U.S.C. § 1110, prohibition on exculpatory contracts and § 404 fiduciary provisions. (Compl. ¶¶ 58-62, 82-90). Count IV alleges a § 502(a)(3), 29 U.S.C. § 1132(a)(3), "knowing participation" claim against Seller Defendants and any other Selling Shareholders for their participation in the stock purchase transaction prohibited under ERISA §§ 406(a)(1)(A) and 406(a)(1)(D), 29 U.S.C. §§ 1106(a)(1)(A), 1106(a)(1)(D). (Compl. ¶¶ 9-11, 91-99).

Plaintiff sues under ERISA § 502(a)(2) seeking to recover "any losses to the plan" under § 409(a), and other relief, arising from the Trustee's ERISA violations, including recovering the excess amount between fair market value on the date of the January 2019 Transaction and what the Plan paid for the stock. 29 U.S.C. §§ 1109(a), 1132(a)(2); Compl. ¶¶ 3, 10, 11, 56, 57, 69, 70, 75, 76. Plaintiff alleges the Plan was injured in the Transaction when it overpaid for the stock and suffered monetary loss in 2019. (Compl. ¶¶ 3-5, 48, 56, 71, 81). He, like other participants, was injured with monetary loss to his Plan account which was worth less than it should have been because it was allocated overpriced stock in 2019 and 2020, and any monies recovered to the Plan should be allocated to the participants' accounts. (Compl. ¶¶ 2-4, 10, 14, 44, 103).

III. APPLICABLE LEGAL STANDARDS

Rule 12(b)(1). Questions of Article III standing are appropriately addressed via a motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. *Swanigan v. City of Chicago*, 881 F.3d 577, 583 (7th Cir. 2018). The court must accept as true all material allegations of the complaint, construe the complaint in favor of the plaintiff, and draw all reasonable inferences in favor of the plaintiff. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Scanlan v. Eisenberg*, 669 F.3d 838, 841 (7th Cir. 2012). The plaintiff must allege facts demonstrating the elements of standing: (1) an injury in fact suffered by the plaintiff, (2) that is fairly traceable to the challenged conduct

of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 808 (7th Cir. 2013). "The test for injury in fact asks whether the plaintiff has suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Fox v. Dakkota Integrated Sys., LLC*, 980 F.3d 1146, 1151 (7th Cir. 2020) (quoting *Spokeo*, 578 U.S. at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (quotations omitted).

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (cleaned up); *accord Abbott*, 725 F.3d at 809. "[T]he standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf," an inquiry that "in no way depends on the merits of the plaintiff's contention that particular conduct" creates liability. *Warth*, 422 U.S. at 498–500 (cleaned up); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015) (cautioning courts must not conflate the potential weakness of a claim on the merits with an absence of Article III standing); *Abbott*, 725 F.3d at 808 (courts "must resist the urge to make a preliminary question depend on the final resolution of the merits. . . . Injury-in-fact for standing purposes is not the same thing as the ultimate measure of recovery. The fact that a plaintiff may have difficulty proving damages does not mean that he cannot have been harmed."); *Arreola v. Godinez*, 546 F.3d 788, 794–795 (7th Cir. 2008) ("Although the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing. Standing is a prerequisite to *filing suit*, while the underlying merits of a

claim (and the laws governing its resolution) determine whether the plaintiff is *entitled to relief*.") (emphasis in original).

Rule 12(b)(6). When considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the court asks whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Chesemore v. Alliance Holdings, Inc.*, 770 F. Supp. 2d 950, 979 (W.D. Wis. 2011) ("Rule 8 requires that plaintiffs allege sufficient facts to make it more than speculation as to whether discovery will reveal evidence to support the claim; not that plaintiffs map out a clear path to victory."). This is not a "probability requirement." *Iqbal*, 556 U.S. at 678. "[A]n ERISA plaintiff alleging breach of fiduciary duty does not need to plead details to which she has no access, as long as the facts alleged tell a plausible story." *Allen v. GreatBanc Tr. Co*., 835 F.3d 670, 678 (7th Cir. 2016) (ESOP case); *see also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) ("ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences"); *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 728-29 (5th Cir. 2018) ("ERISA plaintiffs should not be held to an excessively burdensome pleading standard," rejecting "overly burdensome pleading requirements in ERISA contexts"); *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995) ("[T]he circumstances surrounding alleged breaches of fiduciary duty may frequently defy particularized identification at the pleading stage. . . . [W]e relax pleading requirements where the relevant facts are known only to the defendant"). Contrary to Defendants' misreading of *Dudenhoeffer*, "[n]o heightened pleading standard applies here; it is enough to provide the context necessary to show a plausible claim for relief." *Allen*, 835 F.3d at 674; *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 412, 418–419, 425 (2014) (rejecting

"defense-friendly" presumption of prudence standard adopted by various Courts of Appeals and holding ESOP fiduciaries are not entitled to any "special presumption").

Pleadings on "information and belief" are allowed under the Federal Rules of Civil Procedure and are especially warranted where the facts "concern matters peculiarly within the knowledge of the defendants." *Brown v. Budz*, 398 F.3d 904, 914 (7th Cir. 2005); *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010); Fed. R. Civ. P. 11(b)(3); *see also Rotella v. Wood*, 528 U.S. 549, 560 (2000) (Rule 11(b)(3) allows pleadings based on evidence reasonably anticipated after further investigation or discovery). A court must draw all reasonable inferences in the plaintiff's favor, take the plaintiff's factual allegations as true, and construe the complaint in the light most favorable to the plaintiff. *See Johnson v. Enhanced Recovery Co.*, 961 F.3d 975, 980 (7th Cir. 2020); *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146 (7th Cir. 2010).

IV. ARGUMENT

A. Plaintiff Has Constitutional Standing

1. <u>The Complaint alleges the elements of Article III standing.</u>

In defined contribution plan cases like this, a plaintiff satisfies "the requirements of Article III [where] he has alleged actual injury to his own Plan account . . . fairly traceable to [a defendant's] conduct . . . [and] likely to be redressed by a favorable judgment." *Braden*, 588 F.3d at 592; *see also Harzewski v. Guidant Corp.*, 489 F.3d 799, 803 (7th Cir. 2007) (defined contribution plan participants had Article III standing "because if they win they will obtain a tangible benefit"); *In re Mutual Funds Inv. Litig.*, 529 F.3d 207, 216 (4th Cir. 2008) (first two elements met on plaintiffs' allegations "they suffered injury in that their retirement accounts were worth less than they would have been absent the breach of duty, and this injury was caused … by the fiduciaries' misconduct"); *Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 295 (3d Cir. 2007)

("Graden alleges that Conexant's mismanagement of plan assets caused a loss to the plan that ultimately harmed him and other plan participants. . . . this allegation clearly qualifies as a concrete injury traceable to Conexant and redressable by a court"). Plaintiff alleges these elements.

There is no dispute on this motion that: (1) Plaintiff is a Plan participant who vested in shares of Extreme Engineering in his Plan account; and (2) the Trustee was responsible for the stock valuation and approval of the transaction that Plaintiff alleges caused injury to his account because the Plan was made to overpay in violation ERISA §§ 404 and 406. Plaintiff seeks to recover the Plan's losses under ERISA §§ 409(a) and 502(a)(2). ERISA makes fiduciaries personally liable for breaches of their fiduciary duties, *see* ERISA § 409(a), and authorizes recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account. ERISA § 502(a)(2); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008). In ESOP cases like this where the participants' accounts hold employer stock for which the ESOP overpaid, the participants are injured along with their ESOP such that their losses are "coterminous" with their plan's losses. *Perez v. Bruister*, 823 F.3d 250, 258 (5th Cir. 2016) ("the 'loss [] to the plan' is the amount that the ESOP overpaid for [company] stock. Consequently, the losses suffered by the participants in the ESOP are coterminous with those of the plan, and [Plaintiff's] individual claim is proportional to the claims and losses of fellow participants.").

Plaintiff has therefore alleged injury to himself that is "particularized" because it affects him "in a personal and individual way," as affecting his Plan account. *Fox*, 980 F.3d at 1152 (citing *Lujan*, 504 U.S. at 560 n.1). The alleged injury is "actual or imminent" because it happened in 2019 and 2020 when the Plan was injured in the ESOP Transaction and Plaintiff was allocated Extreme Engineering shares to his Plan account. (Compl. ⁋⁋ 2, 5, 43, 44, 103). The alleged injury is "concrete" and "tangible" as a real monetary loss existing since 2019, not an abstract injury or

a bare procedural violation divorced from any concrete harm. *Spokeo*, 578 U.S. at 340–341; *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) ("certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as … monetary harms. If a defendant has caused … monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III."); *Fox*, 980 F.3d at 1152 ("Concrete injuries can be either tangible or intangible. Tangible injuries are easy to recognize; monetary losses … are common examples.") (citations omitted); *Graden*, 496 F.3d at 295.[2]

This lawsuit is about the Plan's overpayment for company stock, which is allocated to participants' individual accounts (including Plaintiff's), in a transaction caused by the Trustee in violation of its duties under ERISA, which provides causes of action against the Trustee. Therefore, as demonstrated in numerous other private company ESOP cases in this Circuit and elsewhere, the standing elements are alleged, including injury to Plaintiff, a Plan participant. *See Placht v. Argent Tr. Co.*, No. 21 C 5783, 2022 WL 3226809, at *2–4 (N.D. Ill. Aug. 10, 2022) (holding "Article III standing … requires a plaintiff to show an injury-in-fact that is fairly traceable to the defendant's conduct and that could likely be redressed by a favorable court decision," court denies 12(b)(1) motion in ESOP case); *Henry v. Wilmington Tr., N.A.*, No. 19–1925, 2021 WL 4133622, at *4 (D. Del. Sept. 10, 2021) ("Plaintiff alleges that he held BSC stock in his individual account in the Plan, has a vested interest in that stock, and the value of the stock in his account was diminished due to Defendants' ERISA violations in the stock purchase transaction that caused

[2] Defendants cite *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), which held that pleading a statutory violation without injury does not establish a case or controversy, but Plaintiff does not claim otherwise. Participants will always be injured in meritorious private company ESOP cases because the losses to their individual accounts are "coterminous" with their plans' losses. *Bruister*, 823 F.3d at 258. The Supreme Court itself distinguished *Thole*, which concerned a defined-benefit plan, from defined-contribution plan (a.k.a. individual account plan) litigation like this case. 140 S. Ct. at 1618–1619.

the Plan to pay too much for the stock and caused fewer shares to be allocated to Plaintiff. These allegations, taken together and accepted as true, are sufficient to establish Plaintiff's standing.") (citations to complaint omitted); *Neil v. Zell*, 767 F. Supp. 2d 933, 950-51 (N.D. Ill. 2011) (participants sufficiently demonstrated Article III injury-in-fact because they claimed their individual accounts in the ESOP would be worth more had defendants "abided by ERISA's requirements").[3] For these reasons, the Court should hold Plaintiff has constitutional standing and deny the Rule 12(b)(1) motion to dismiss.

2. **<u>The Complaint makes the required "general factual allegations of injury."</u>**

As noted in Part III, *supra*, how a plaintiff must allege injury at the pleading stage has been long defined by the Supreme Court: "At the pleading stage, *general factual allegations of injury* resulting from the defendant's conduct may suffice, for on a motion to dismiss *we presume that general allegations embrace those specific facts* that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (emphasis added). The Complaint here more than meets this requirement.

The Complaint alleges the Trustee caused the Plan to pay more than fair market value for Extreme Engineering stock in the 2019 stock purchase transaction. (*E.g.*, Compl. ⁋⁋ 3, 4, 8, 77, 79, 103). That should end the inquiry because fair market value, although incorporated into the statute (29 U.S.C. § 1002(18)), is a question of fact based on numerous contemporaneous valuation assumptions. The Complaint further alleges the individual Plan accounts of participants, including Plaintiff's, were injured because they were allocated such overvalued stock and did not receive the retirement benefits they earned through their labor. (*E.g.*, *id.* ⁋⁋ 3, 4, 14, 30, 44, 103). Again, the

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[3] *See also Swain*, 2018 WL 934598, at *4 ("the court finds that Plaintiffs' complaint demonstrates a cognizable injury-in-fact with respect to the damages claims"); *Innis*, 2017 WL 4876240, at *3-5 (denying 12(b)(1) motion, plaintiff had Article III standing).

injury to the ESOP is the same as the injury to its participants. *See Bruister*, 823 F.3d at 258 ("the losses suffered by the participants in the ESOP are coterminous with those of the plan"). And while Seller Defendants and the Trustee suggest Plaintiff enjoyed a windfall because he "was granted stock at no cost to himself" (Dkt. 22 at 15; *cf.* Dkt. 19 at 2, 7), that is wrong as the courts recognize that "employee benefits," including employer contributions to an ESOP, "are not a mere gratuity . . . but a form of deferred wages." *Reich v. Valley Nat'l Bank of Ariz.*, 837 F. Supp. 1259, 1286-87 (S.D.N.Y. 1993) (citing *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948)); *see also Brundle v. Wilmington Tr., N.A.*, 919 F.3d 763, 769 n.1 (4th Cir. 2019) ("An employer's contributions to an ESOP thus constitute a valuable form of deferred compensation, rather than a gift to employees."); *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 443-44 (6th Cir. 2002) (money employer paid into ESOP "was a form of deferred compensation for the participants" and benefits were "not a gratuity"). The Seventh Circuit emphasized: "there are no free lunches; any [ESOP] benefit that an employer confers on an employee is reckoned by the employer as a cost and so affects the overall level of compensation that he is willing to pay." *Steinman v. Hicks*, 352 F.3d 1101, 1103 (7th Cir. 2003). Participants are harmed when their plan overpays for stock because they lose retirement money. *See Brundle*, 919 F.3d at 669 n.1 & 770 (participants suffered loss to the value of their retirement savings, deferred compensation, if their employer stock was not worth what the ESOP paid for it); *Chao*, 285 F.3d at 444 (participants lost deferred compensation when ESOP overpaid for stock). Plaintiff's general allegations of injury are sufficient to prove he has a "case or controversy" and standing to bring his claims.

But Plaintiff alleges yet more details about how the Plan was made to overpay for Extreme Engineering stock:

- "The appraisal used by the Trustee in the ESOP Transaction included an industry and

economic analysis, which considered companies with different characteristics than Extreme Engineering." (Compl. ⁋ 51). Use of comparators that were "not a good match" can and did cause the stock to be overvalued. *Brundle*, 919 F.3d at 776 n.7.

- The Trustee's routine practice is "failing to apply sound business principles of evaluation and to conduct a prudent investigation and negotiation." (Compl. ⁋ 54). This routine practice is supported by the U.S. Department of Labor's (DOL) conclusion that "PFS had relied on unrealistic projections and improperly caused an ESOP to pay a control premium, which caused the ESOP to overpay for stock above fair market value," and DOL's forcing Defendants PFS and Maier out of the ESOP creation business. (*Id.* ⁋⁋ 49, 50). The routine practice is also supported by routine industry practices of ESOP trustees (*Id.* ⁋ 54), as observed in case law that shows ESOP trustees incorrectly contend that they may do a lesser (and cheaper) level of due diligence than a so-called "real world buyer" (*i.e.*, anyone else buying a company). *Brundle v. Wilmington Tr. N.A.*, 241 F. Supp. 3d 610, 637 (E.D. Va. 2017). And these industry practices have been observed by Plaintiff's counsel in numerous ESOP cases (Compl. ⁋⁋ 53, 55), which must be a factor in "potential plaintiffs' cost-benefit analyses" whether they can "point to any actual harm" to bring suit. *Allen*, 835 F.3d at 677. Federal Rule of Evidence 406 permits: "Evidence of an organization's routine practice to prove that on a particular occasion the organization acted in accordance with the routine practice." Trustees do not invent new methodologies with each transaction; routine practices must be acceptable "general allegations" at the pleading stage.

- The Selling Shareholders controlled Extreme Engineering after the ESOP Transaction but the Plan did not receive a discount for lack of control and improperly paid a control premium or on a control basis. (Compl. ⁋⁋ 45–48, 50).

- "Extreme Engineering provided financial projections to the Trustee for the valuation of the

ESOP Transaction . . . [that] were unreasonably optimistic." (*Id.* ¶ 52). The Trustee caused the ESOP to overpay upon a methodology using unrealistic projections. (*Id.* ¶¶ 50, 53).[4]

- The Trustee was appointed by Extreme Engineering, while under the control of Selling Shareholders, to represent the counterparty Plan in the Transaction. (*Id.* ¶¶ 41, 45, 46). Selling Shareholders, who benefited from the Trustee's breaches of ERISA in the Transaction, gave the Trustee an unlawful indemnification agreement that would be paid by the ESOP-owned company rather than by them, and the Trustee was rewarded with the position of ongoing trustee and fees that would be paid by the ESOP-owned company. (*Id.* ¶¶ 17, 54, 58–61). In no transactions other than inherently conflicted "ESOP industry" transactions do sellers of a multimillion dollar company get to hire the counterparty with whom they ostensibly negotiate; protect that counterparty with an indemnification agreement under which *the buyer* is required to pay; or bind the buyer to pay future fees of the seller-selected trustee through the company the buyer purchased. Defendants' actions in permitting an unlawful indemnification agreement and appointing the Trustee rather than having an independent fiduciary do so further support a "plausible story" of fiduciary breach resulting in harm. *Allen*, 835 F.3d at 678.

[4] While Defendants gripe about allegations "on information and belief" preceded by language commanded by Rule 11(b)(3), such allegations are allowed, as explained in Part III, *supra*. The allegations of which they complain at ¶¶ 47 and 53 are in any event a small part of the Complaint, with allegations not on information and belief proving the bulk of the required "general allegations" of injury. In *Allen* the Seventh Circuit held that "information about … how stock was valued [is] confidential financial information" not likely to be turned over "without the protections of the discovery process," and it is well-established that "an ERISA plaintiff alleging breach of fiduciary duty does not need to plead details to which she has no access." *Allen*, 835 F.3d at 677–678; *see also Blackwell*, 2019 WL 1433769, at *2 (ESOP participants with limited access to crucial information must be allowed to use information and belief allegations to ensure ERISA's remedial scheme does not fail and to secure crucial rights). Allegations on "information and belief" are especially warranted in cases like this where the facts about trustee diligence and private company financials and valuation are peculiarly within the possession and control of the defendants. *See Brown*, 398 F.3d at 914; *Allen*, 835 F.3d at 678; *Braden*, 588 F.3d 585 at 597–98.

- As in *Allen*, "the loan came from the employer-seller rather than from an outside entity (indicating that outside funding was not available)," which supports a "plausible story" of fiduciary breach resulting in harm. *Allen*, 835 F.3d at 678; Compl. ¶¶ 5, 42, 43.[5]

The Complaint therefore contains *both* general and detailed factual allegations of injury, and that injury is particularized, concrete, and actual, as explained in Part IV.a.1, *supra*. Plaintiff has alleged the concrete and tangible injury of monetary losses to the Plan dating from 2019 and to Plaintiff dating from 2019 and 2020 that, therefore, are real and exist. He does not allege an abstract injury of the type barred under *Spokeo*. To be concrete and exist is to be "real and not abstract" – that's not a requirement to prove injury on the pleadings. *Spokeo*, 578 U.S. at 340 (cleaned up). And while Defendants are arguing Plaintiff must prove entitlement to relief and negate the ERISA § 408(e) adequate consideration affirmative defense on the merits, he is not required to do so to have standing, under well-established Supreme Court and Seventh Circuit precedent. *See* Part III, *supra*; *see also Placht*, 2022 WL 3226809, at *3 ("injury-in-fact for standing purposes is not the same thing as the ultimate measure of recovery. The *Abbott* court explained that a plaintiff satisfies her burden of establishing injury-in-fact for pleading purposes by alleging harm from the defendant's mismanagement of the fund.") (cleaned up).

Finally, Defendants' reliance on *Lee v. Argent Tr. Co.*, 2019 WL 3729721 (E.D.N.C. Aug. 7, 2019), and *Plutzer v. Bankers Tr. Co. of S.D.*, 2022 WL 596356 (S.D.N.Y. Feb. 28, 2022), *appeal docketed*, No. 22-561 (2d Cir. Mar. 15, 2022), makes no sense other than that those outliers

[5] Defendants' argument that Transaction "debt is not a burden to the ESOP—rather, the sponsoring company typically gives the ESOP the money to pay it back" (Dkt. 22 at 7) is absurd because the ESOP owns the company. Payment by the company is essentially payment by the Plan and its participants, the company's owners. *Cf. Johnson v. Couturier*, 572 F.3d 1067, 1080 (9th Cir. 2009) ("advancement is here tantamount to asking ESOP participants to pay for Defendants' defense costs"); *McMaken*, 2019 WL 1468157, at *4 (under the majority view, indemnification by an ESOP sponsor functionally equates to an impermissible indemnification by the plan itself).

are the only existing dismissals on standing grounds of cases challenging ESOP formation transactions. Those cases are distinguishable because the only allegations of injury the courts identified were post-transaction drops in stock valuation; but that allegation is not in the Complaint here, which makes numerous other allegations of injury. *Lee* and *Plutzer* are irrelevant. Defendants themselves concede that "Plaintiff is silent about the ESOP's post-Transaction performance." (Dkt. 22 at 13). Further, those decisions are bad law in this Circuit, where a drop in stock value *is* a valid allegation to permit an ESOP participant to go forward with his case. *Allen*, 835 F.3d at 678–680 ("whether the 22% decline in value—a decline that lasted not months but years and ballooned to nearly 50%—was the result of normal economic forces or something more sinister is a matter for a later stage of litigation");[6] *Placht*, 2022 WL 3226809, at *3–4 (rejecting *Lee* and *Plutzer* as "the Seventh Circuit has rebuffed similar arguments at the pleading stage"). Defendants' motions based on those decisions wastes the Court's time in light of *Allen*, which they ignore, and should be denied just as other constitutional standing motions by their counsel in ESOP cases have failed. *See Henry v. Wilmington Tr., N.A.*, No. 19–1925, 2021 WL 4133622, at *2–4 (D. Del. Sept. 10, 2021); *Swain v. Wilmington Tr., N.A.*, No. 17–71, 2018 WL 934598, at *4 (D. Del. Feb. 16, 2018); *Innis v. Bankers Tr. Co. of S.D.*, No. 4:16– cv–00650, 2017 WL 4876240, at *3-5 (S.D. Iowa Oct. 13, 2017).

3. Post-Transaction valuations do not disprove injury in the 2019 Transaction.

Defendants' argument (Dkt. 22 at 14) that the Plan and its participants did not suffer injury by overpaying for Extreme Engineering at the time of the January 2019 Transaction because Forms

[6] While the *Allen* court was not considering a Rule 12(b)(1) motion, it addressed allegations of harm and presumably found Article III standing because it had "an independent obligation to assure that standing exists." *Pavlock v. Holcomb*, 35 F.4th 581, 588 (7th Cir. 2022) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)).

5500 filed with the government reported alleged appreciation in stock value at later times is wrong as a matter of law.

First, unlike *Lee* and *Plutzer* where the complaints alleged post-transaction stock valuations reported in Forms 5500, here it is Defendants who rely on post-transaction valuations for their argument. But it is well-established that the Court may not take judicial notice of the stock values reported in the Forms 5500 for their truth. *See Lysengen v. Argent Tr. Co.,* 498 F. Supp. 3d 1011, 1017-18 (C.D. Ill. 2020) (citing authority). Further, these valuations are outside the pleadings. The reported valuations here cannot be taken as true and can provide no basis for dismissal. And the Seventh Circuit flatly rejects the proposition that private company valuations are reliable, in contrast to the market value of companies traded on a public market, and it draws inferences in a plaintiff-participant's favor that such valuations were not made with the proper methodology.[7] Further, this case challenges the January 2019 trustee valuation and it makes no sense to make what would be a prohibited inference *in favor of defendants* that later valuations were accurate because the Trustee found religion and started using the correct methodology. The 2020 Form 5500 submitted by Defendants disproves that happened because it concedes Extreme Engineering stock was valued "using methods consistent with prior years." (Ex. B to Scidmore Decl., Dkt. 23-2 ("2020 Form 5500") at p.19 of 25). The Complaint alleges Extreme Engineering stock was overvalued by the use of improper comparators (Compl. ⁋ 51) and under "methods consistent" the small tech company may be inferred to have continued to be overvalued with comparison to

[7] *Allen*, 835 F.3d at 679 (the trustee "has assumed things that may or may not be true in a particular case. Was the trustee unbiased? Was it independent? Did it have solid data behind its assessment? None of those questions is important in the case of public markets; all of them and more are for private holdings. The inference from the plaintiffs' complaint is that [the trustee] did not rely on an unbiased, independent assessment, nor did it use an assessment that started with a trustworthy benchmark.").

distinguishable tech companies (from $500,000 to $186 million in less than two years during the tech boom).[8]

Second, Defendants' argument that injury in fact cannot be shown where a stock's value appreciated after an ESOP transaction is erroneous because "fair market value is to be determined as of the date of the transaction." *Montgomery v. Aetna Plywood, Inc.*, 39 F. Supp. 2d 915, 937 (N.D. Ill. 1998). An overpayment on company stock by an ESOP as of such date is *not offset by subsequent stock appreciation*. *See Brundle*, 919 F.3d at 782 ("Any subsequent gains involving the stock, which the ESOP would have obtained regardless of the overpayment, have no bearing on that loss."). Even if Extreme Engineering stock appreciated after the ESOP Transaction, that would not mitigate the Plan's losses.

Third, while Defendants quote *Lee* (Dkt. 22 at 11), that decision is erroneous. *Lee*'s conclusion that if an ESOP's stock is valued above zero in the weeks following a fully leveraged transaction the ESOP must have bought the stock "at a discount" and made "a tidy profit," and its participants lack injury-in-fact to bring a claim, reflects a misunderstanding of leveraged transactions. 2019 WL 3729721, at *4. In almost all new leveraged ESOPs, the employer makes a contribution to the plan soon after, the plan in turn pays down its loan to the company, and the

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[8] ESOP trustees in this Circuit have incentive to report post-transaction stock appreciation since *Allen* held a stock drop to be grounds to deny motions to dismiss. 835 F.3d at 678–680. The Seventh Circuit declined a trustee's invitation to hold private company valuations reliable, and unreliable valuation may be inferred by Forms 5500 here. While Defendants claim the stock jump from $500,000 to $186 million in less than two years was because "Extreme Engineering's business has been booming" (Dkt. 22 at 14), that jump cannot be attributed to contributions by a booming company because by year-end 2020 the ESOP's debt had been reduced only to $74,623,758 from $80,377,400 by company contributions. (2020 Form 5500 at Schedule H line 1i, p.6 of 25; Compl. ⁋ 5). As Plaintiff alleges with regard to the Transaction valuation, the later valuations were puffed up with improper comparables. Importantly, the Forms 5500 concede the valuations used market valuation techniques and an industry analysis. (2020 Form 5500 at Note 2, p.19 of 25). Rather than supporting dismissal, the Forms 5500 submitted by Defendants hoist them by their own petard by supporting the theory of the case set out in the Complaint.

company in turn repays loans to sellers, thereby increasing the equity value of the company and the value of the stock. In other words, the first post-transaction valuation of the company is almost always positive regardless of whether the plan paid more than adequate consideration. To take *Lee*'s mortgage analogy, if a home buyer pays $2 million for a $1 million home, borrows $2 million, and immediately pays $100,000 on the loan, the home-owner's equity in the home is positive if one simply compares purchase price to debt, but it doesn't change the fact the home is really worth $1 million and the home-owner overpaid and overborrowed to the tune of $1 million, respectively. *Cf. Placht*, 2022 WL 3226809, at *4 ("even accepting the *Lee* premise that a purchaser would incur no change in equity before and after a properly priced financed purchase transaction is anticipated to be unchanged does not require a determination that Plaintiff here was uninjured in the ESOP Transaction").

Fourth, *Lee* does not understand the measure of plan losses in ESOP cases, which are calculated by subtracting the actual fair market value on the date of the transaction from what the plan paid for the securities. *See Bruister*, 823 F.3d at 258, 265–66; *Brundle*, 919 F.3d at 781; *Chao*, 285 F.3d at 420, 444; *Neil*, 767 F. Supp. 2d at 944-45. Whether the value of ESOP stock reported to the DOL and IRS in annual reports after a transaction is or is not above zero says nothing about whether the ESOP overpaid at the time of the transaction. As noted, employer contributions are made and shares allocated to participants, and the reported value will thus be positive, but that does not mean the plan did not overpay on the transaction date.[9]

[9] Notably, the Forms 5500 show Extreme Engineering made contributions to the Plan after the Transaction, which would have affected later valuations. (2019 Form 5500 at Statement of Changes in Net Assets Available for Benefits, Ex. A to Scidmore Decl., Dkt. 23-1, at p.17 of 27; 2020 Form 5500 at Statement of Changes in Net Assets Available for Benefits, p.17 of 25). Thus, equally applicable here is *Placht*'s observation that: "[the plan sponsor] later paid millions of dollars into the ESOP, and the Court is unable to assess at this early stage to what extent those contributions may have affected subsequent valuations." *Placht*, 2022 WL 3226809, at *3.

Fifth, Defendants' theory of fair market value is "voodoo economics" for expert rebuttal, and not grounds for a Rule 12 dismissal. Indeed, the Court will see that none of Defendants' experts will offer an opinion supporting this silly analysis of fair market value.

B. The Complaint States Claims upon Which Relief Can be Granted

1. Count I states ERISA § 406 prohibited transaction claims.

Count I of the Complaint alleges against the Trustee violations of three distinct sections of ERISA's prohibited transaction rule: ERISA §§ 406(a)(1)(A), 406(a)(1)(B), and 406(a)(1)(D). (Compl. ⁋⁋ 63-71). Seller Defendants do not show that Plaintiff failed to plead the § 406 elements of his prohibited transaction claims. Their arguments against Count I instead prematurely raise affirmative defenses, which are not properly considered on this motion. All three prohibited transaction claims should survive the motion to dismiss.

Plaintiff's principal claim is that the Trustee's authorization of the Plan's purchase of Extreme Engineering stock from the party in interest Selling Shareholders in January 2019 was prohibited by ERISA § 406(a)(1)(A). (*See*, *e.g.*, Compl. ⁋⁋ 5, 7-10, 64, 67-68). Section 406(a)(1)(A) provides that:

> (a) **Transactions Between Plan and Party in Interest.**—Except as provided in section 408:
>
> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest[.]

29 U.S.C. § 1106(a)(1). To prevail on his § 406(a)(1)(A) claim, Plaintiff must prove: (1) the Trustee was a fiduciary with authority to cause the Plan to engage in the 2019 stock transaction; (2) the Plan purchased Extreme Engineering stock; (3) the persons with whom the Plan transacted were parties in interest; and (3) the Trustee caused the Plan to transact with these parties in interest. *Id.*

Seller Defendants do not challenge the Complaint on *any* of these elements. To the contrary, they admit that ESOP stock purchases from parties in interest are prohibited transactions. (Dkt. 22 at 5 (admitting, "Every ESOP's purchase of stock from company officers, directors, or significant shareholders is technically a 'prohibited transaction' under ERISA section 406(a)" *and* "Section 1106(a) transactions are facially 'prohibited' out of a concern for a potential conflict of interest")). On that admission alone, the Court should therefore deny the motion to dismiss this claim. Plaintiff clearly states a prohibited transaction claim by alleging the elements of a § 406(a) transaction; Defendants' suggestion that the Court should impose additional requirements defies a basic precept of ERISA and invites plain error. The Supreme Court has long recognized that the § 406 prohibited transaction rules "bar categorically" certain transactions, such as the sale of property to a plan by parties in interest, that Congress found likely to injure a pension plan. *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 160 (1993) (explaining that in enacting prohibited transaction rules in response to "abuses such as the sponsor's sale of property to the plan at an inflated price or the sponsor's satisfaction of a funding obligation by contribution of property that was overvalued . . . Congress' goal was to bar categorically a transaction that was likely to injure the pension plan") (citing S.Rep. No. 93–383, pp. 95–96, U.S.Code Cong. & Admin.News 1974, p. 4639 (1973)); *see also Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241–242 (2000) ("Responding to deficiencies in prior law regulating transactions by plan fiduciaries, Congress enacted ERISA § 406(a)(1), which supplements the fiduciary's general duty of loyalty to the plan's beneficiaries, § 404(a), by categorically barring certain transactions deemed 'likely to injure the pension plan'"); *Chesemore*, 770 F. Supp. 2d at 965. Consequently, a complaint alleging a § 406(a) transaction alleges a "per se" statutory violation. *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984) ("the *per se* rules of section 406 make

much simpler the enforcement of ERISA's more general fiduciary obligations"); *McMaken*, 2019 WL 1468157, at *4 ("ERISA § 406 . . . creates *per se* liability for 'transactions in which the potential for misuse of plan assets is particularly great'"); *Neil v. Zell*, 753 F. Supp. 2d 724, 731 (N.D. Ill. 2010) ("§ 406 defines *per se* rules").[10] By alleging the § 406(a)(1)(A) elements, Plaintiff therefore stated a *per se* violation of ERISA and met his pleading burden.

Defendants say Plaintiff hasn't pleaded around the affirmative defense under ERISA § 408(e), that is, he hasn't pleaded facts showing the Plan paid more than "adequate consideration" for the stock.[11] (Dkt. 22 at 19–21). But Plaintiff doesn't have to. It is black letter law that defendants and *not* plaintiffs bear the burden of pleading and proof on affirmative defenses.[12] The Seventh Circuit, in the leading decision addressing the pleading of a private company ESOP case, observed:

> an ERISA plaintiff need not plead the absence of exemptions to prohibited transactions. It is the defendant who bears the burden of proving a section 408 exemption, and the burden of pleading commonly precedes the burden of persuasion. … We now hold squarely that the section 408 exemptions are

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[10] *See also Chao*, 285 F.3d at 434, 439 ("in creating § 406(a), Congress intended to create a category of *per se* violations"); *Donovan v. Cunningham*, 716 F.2d 1455, 1464-65 (5th Cir. 1983) ("The object of Section 406 was to make illegal *per se* the types of transactions that experience had shown to entail a high potential for abuse.").

[11] The § 408(e) exemption provides, in relevant part, that § 406 "shall not apply to the acquisition or sale by a plan of qualifying employer securities … if such acquisition, sale, or lease is for adequate consideration." 29 U.S.C. § 1108(e). In the case of "an asset other than a security for which there is a recognized market," adequate consideration is "[1] the fair market value of the asset [2] as determined in good faith by the trustee or named fiduciary." ERISA § 3(18), 29 U.S.C. § 1002(18). The DOL proposed a regulation elaborating on the definition. *See* Proposed Regulation Relating to the Definition of Adequate Consideration, 53 Fed. Reg. 17,632-33 (May 17, 1988) (to be codified at 29 C.F.R. § 2510.3-(18)(b)). Although the Proposed Regulation was not finalized, the Seventh Circuit holds "this court and other courts of appeals have adopted this two-part standard for evaluating the adequacy of consideration." *Keach v. U.S. Trust Co.*, 419 F.3d 626, 636 n.5 (7th Cir. 2005); accord *Fish v. GreatBanc Tr. Co.*, 749 F.3d 671, 680 (7th Cir. 2014).

[12] *See*, *e.g.*, *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("Since qualified immunity is a defense, the burden of pleading it rests with the defendant. . . . We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith.").

> affirmative defenses for pleading purposes, and so the plaintiff has no duty to negate any or all of them.

Allen, 835 F.3d at 676 (internal citations omitted).[13] Seller Defendants hope to pull the wool over the Court's eyes by pretending *Allen* does not exist. To no avail. Further, the Federal Rules of Civil Procedure place the burden of pleading an affirmative defense on the party responding to a complaint; in contrast, a pleading stating a claim for relief is not required to plead around an affirmative defense. *Compare* Fed. R. Civ. P. 8(a) *with* 8(b)(1)(A) and 8(c)(1). The Trustee bears the burdens on its § 408 defense, not Plaintiff.[14]

2. <u>Count IV states a claim of knowing participation in a prohibited transaction.</u>

To state a claim under Count IV that Seller Defendants knowingly participated in the stock transaction prohibited under § 406(a)(1)(A) and/or § 404(a)(1)(D) (Count I), Plaintiff must allege facts showing it is plausible they had "actual or constructive knowledge of the circumstances that rendered the transaction unlawful" under § 406(a)(1)(A) and/or § 404(a)(1)(D): (1) that they were officers of Extreme Engineering, 10 percent or more shareholders, or otherwise fell into a party in interest category;[15] (2) the Trustee with whom they transacted on behalf of the Plan was the Plan's fiduciary; and (3) they were selling stock to the Plan or receiving Plan assets for their stock. *Harris*

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[13] *See also Brundle*, 919 F.3d at 770; *Bruister*, 823 F.3d at 262; *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 619 (2d Cir. 2006); *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996); *Donovan*, 716 F.2d at 1467-68.

[14] Seller Defendants' only arguments for dismissal of the §§ 406(a)(1)(B) and 406(a)(1)(D) claims are demoted to a single footnote (Dkt. 22 at 21 n.9). Their arguments that §§ 408(b)(3), 408(b)(17), or 408(e) affirmative defenses may be applied because the Complaint failed to negate them must fail for the same reasons the § 406(a)(1)(A) claim should survive.

[15] Seller Defendants are alleged to have been parties in interest on multiple grounds (Compl. ¶¶ 19-22, 45, 96-97), and they do not contest that status. Further, they must have known their jobs, Chief Executive Officer (CEO) and Vice President, and how much stock they owned.

Trust, 530 U.S. at 251; 29 U.S.C. §§ 1106(a)(1)(A), 1106(a)(1)(D). The Complaint alleges those elements.

An ESOP case decision in this Circuit held that knowledge of a "transaction's details at the time it occurred" is all that's required under the "actual or constructive knowledge" standard:

> [Plaintiffs] rely on the Supreme Court's description of when a transferee—as opposed to a transferor fiduciary like GreatBanc—may be held liable for engaging in a prohibited transaction: "the transferee must be demonstrated to have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful." *Harris Trust,* 530 U.S. at 251, 120 S.Ct. 2180. The standard for establishing fiduciary liability cannot be higher than the standard of liability for a nonfiduciary.
>
> . . .
>
> [T]hough GreatBanc argues that it did not know that the transaction was prohibited, there is no doubt that it knew the transaction's details at the time it occurred. And to the extent that the language of *Laborers' Pension Fund* suggests that such knowledge is insufficient to satisfy § 406(a), the court, for the reasons stated above, respectfully disagrees. A plan fiduciary that knows the details of a prohibited transaction "knows or should know" that the transaction is prohibited.

Neil, 753 F. Supp. 2d at 731-732; *see also Godfrey v. GreatBanc Tr. Co.*, No. 18 C 7918, 2019 WL 4735422, at *8 (N.D. Ill. Sept. 26, 2019) (knowledge that company executed stock sale which was § 406 prohibited transaction constitutes "knowledge of the circumstances that rendered the transaction unlawful"). The Complaint contains precisely those allegations.

Further, to the extent Seller Defendants argue the Complaint must allege they knew facts suggesting the adequate consideration affirmative defense was not met, which Plaintiff contests must be pleaded, the Complaint alleges facts that those executive shareholders had actual or constructive knowledge that the Plan was paying more than fair market value, one of the necessary elements of the defense. Courts denying motions to dismiss knowing participation claims against corporate leaders like Seller Defendants have held it plausible that they knew or should have known the relevant facts owing to their corporate positions and seller status. *See Placht*, 2022 WL

3226809, at *13 ("The Court agrees with Plaintiff that allegations that 'high-ranking Symbria officers' knew or should have known the content of projections, company valuations, and other information provided by Symbria, both because of their positions and their participation in the transaction, are sufficient for this stage of the litigation. Plaintiff need not plead more under the circumstances.") (citing authority); *Ahrendsen v. Prudent Fiduciary Servs., LLC*, No. 21-157, 2022 WL 294394, at *8 (E.D. Pa. Feb. 1, 2022) (denying dismissal of claim against director alleged to be "centrally involved in this transaction").

Seller Defendants were intimately involved in the Transaction because they were the shareholders who sold their Extreme Engineering stock to the Plan in a $80,377,000 transaction. (Compl. ⁋⁋ 5, 19-22, 43, 64). They were "parties to the stock purchase agreement containing the terms of the Plan's stock purchase from Selling Shareholders and countersigned by the Trustee on behalf of the Plan." (*Id.* ⁋ 97). Further, Seller Defendants were directors and officers (CEO and Vice President) of Extreme Engineering at the time of the Transaction and they controlled the company. (*Id.* ⁋⁋ 19-22, 45, 46, 97). Under their leadership, Extreme Engineering adopted the Plan, an employee stock ownership plan, which provided pension benefits to their employees that were hard-earned through their labor, and their company was made a Plan fiduciary. (*Id.* ⁋⁋ 4, 5, 26-28, 34, 36, 37). Under their leadership, Extreme Engineering appointed the Trustee to be the Plan's fiduciary trustee in the ESOP Transaction, with authority to negotiate and approve the Transaction. (*Id.* ⁋⁋ 7, 17, 18, 41, 67). Under their leadership, Extreme Engineering management provided the financial projections the Trustee used in the Transaction valuation. (*Id.* ⁋⁋ 52, 78). Under their leadership, Extreme Engineering provided a $80,377,000 loan to the Plan in the ESOP Transaction. (*Id.* ⁋⁋ 5, 43). Seller Defendants received Plan assets in the Transaction as a result of that loan, directly or indirectly. (*Id.* ⁋⁋ 5, 9, 43, 66, 94). These facts show Defendants plausibly had actual

or constructive knowledge of the basic details of the Transaction. Moreover, as selling shareholders, as directors and officers of a company that was being sold to an ESOP created under their tenure, as CEO and Vice President of a company that was making a huge loan, and as the highest-ranking officers of the company providing financial projections to the Trustee, Defendants plausibly knew the fair market value of Extreme Engineering, which was less than what the Plan paid. Any suggestion otherwise is implausible, requiring an appalling lack of diligence.

While Defendants appear gob smacked by the notion that party-in-interest sellers and high-ranking executives of a privately held corporation must necessarily know or should know basic details of an ESOP transaction, the notion that it could be otherwise is implausible. Here, it would be utterly implausible that the executive shareholders who steered their company to a change of ownership in a $80,377,000 transaction and who were personally parties to the stock purchase agreement and who controlled Extreme Engineering which was a party to that agreement as a result of the loan it provided would not do their due diligence and would not review the documents they signed providing the necessary "transaction details." The Supreme Court has charged the reviewing court "to draw on its judicial experience and common sense" in the "context-specific task" of determining whether a complaint states a plausible claim for relief. *Iqbal*, 556 U.S. at 679. Based on experience and common sense, this Court should decline to accept Defendants' alternate reality in which they entered into a multimillion-dollar transaction to sell Extreme Engineering without knowledge of basic transaction details or the true value of the company. The Court should hold Plaintiff's claims plausible.

V. CONCLUSION

For these reasons, the Court should deny Defendants Scidmore and Farnum's motion to dismiss in its entirety.

Dated: November 11, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of November 2022, a copy of the foregoing document was served on all counsel of record via ECF.

/s/ Gregory Y. Porter
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