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 PROFESSIONAL FIDUCIARY SERVICES, LLC
AND JOHN MICHAEL MAIER'S MOTION TO DISMISS

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I. INTRODUCTION

Defendants Professional Fiduciary Services, LLC and John Michael Maier (together, the "Trustee") move to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Dkt. 18, "Motion"). Their Rule 12(b)(1) constitutional standing argument doesn't raise different issues than the Rule 12(b)(1) motion (Dkt. 21) of Defendants Robert S. Scidmore and Bret Farnum ("Seller Defendants") and should fail for the same reasons set forth in Plaintiff Scott MacTaggert's concurrently filed opposition to that motion. We do not repeat the arguments in opposition here.

The Trustee makes little effort to argue for Rule 12(b)(6) dismissal of the Count I ERISA § 406 prohibited transaction claims or the Count II ERISA § 404 breach of fiduciary duty claims beyond pretending the Complaint does not contain allegations in support. But the Complaint alleges facts supporting *every element* of Plaintiff's prohibited transaction claims and he bears no burden to negate ERISA § 408 affirmative defenses in his Complaint. *See Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 676 (7th Cir. 2016) (leading decision defining standard for pleading private company ESOP cases, overturning dismissal). All the elements of a breach of fiduciary duty are also well-pleaded with factual allegations. The Trustee's motion to dismiss the Count III ERISA § 410 unlawful exculpatory provision claim is meritless under the majority view that ESOP-owned companies cannot be made to indemnify a fiduciary because that would be functionally equivalent to the ESOP doing so, which even the Trustee does not contest is prohibited. 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

$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

The arguments in the Trustee's motion for dismissal for want of Article III standing are addressed in Plaintiff's concurrently filed opposition to the motion to dismiss of Defendants Robert S. Scidmore and Bret Farnum ("Seller Defendants"). Rather than burden the Court with redundant briefing, Plaintiff refers to and incorporates herein Part IV.A of that brief. For the reasons stated therein, Plaintiff has constitutional standing and the Trustee's Rule 12(b)(1) motion to dismiss should be denied.

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

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

The Trustee's one paragraph argument against the Count I prohibited transaction claims recites the ERISA § 406 elements of the claims but, frankly bizarrely, argues: "because MacTaggert has not plead [sic] facts that allow the court to draw the reasonable inference that the

Trustee Defendants caused the Plan to engage in a prohibited transaction, Count I fails to state a claim against the Trustee Defendants and must be dismissed." (Dkt. 19 at 9). Not true. The Complaint alleges facts concerning every element of his three prohibited transaction claims under ERISA §§ 406(a)(1)(A), 406(a)(1)(B), and 406(a)(1)(D), 29 U.S.C. §§ 1106(a)(1)(A), 1106(a)(1)(B), 1106(a)(1)(D). The Rule 12(b)(6) motion to dismiss them should be denied.[1]

ERISA's section 406(a) prohibited transaction provision provides, in relevant part:

> **(a) TRANSACTIONS BETWEEN PLAN AND PARTY IN INTEREST**
>
> Except as provided in section 1108 of this title:
>
> (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;
>
> (B) lending of money or other extension of credit between the plan and a party in interest;
>
> . . .
>
> (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.

29 U.S.C. § 1106(a).

Relevant to multiple claims, the Complaint alleges the Trustee—Defendants Professional

[1] The Trustee made no effort to explain what elements it contends are not pleaded or to otherwise put Plaintiff on notice of how it contends the Complaint is deficient under Rules 8(a) and 12(b)(b). To the extent the Trustee is withholding its argument to sandbag Plaintiff in its reply brief, such arguments are waived and/or Plaintiff should be entitled to a surreply. *See, e.g.*, *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010) ("Arguments raised for the first time in a reply brief are generally waived."); *Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993) (holding, "[a]rguments may not be made for the first time in a reply brief"); *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 360 (7th Cir. 1987) (Posner, J., concurring) ("A reply brief is for replying, not for raising a new ground"); *Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, 745 F.2d 324, 327 n.3 (4th Cir. 1984) ("A reply brief is supposed to be a response to the appellee's brief, not a pursuit of a wholly new tack. The appellee rightly objected to the appellant's 'sandbagging'"). The decision whether to grant leave to file a surreply is within the Court's discretion. *See Johnny Blastoff, Inc. v. L.A. Rams*, 188 F.3d 427, 439 (7th Cir. 1999).

Fiduciary Services, LLC and John Michael Maier—was an ERISA fiduciary 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. (Compl. ¶¶ 1, 3, 7, 17, 18, 41, 42, 67). The Complaint alleges Seller Defendants were parties in interest. (*Id.* ¶¶ 9, 19-22, 45, 64). Extreme Engineering was a party in interest. (*Id.* ¶¶ 5, 31-39, 64, 65).

Regarding the ERISA § 406(a)(1)(A) claim, the Complaint alleges the Plan purchased Extreme Engineering stock, directly or indirectly, from Seller Defendants and Extreme Engineering, in the January 2019 ESOP Transaction. (Compl. ¶¶ 5, 43, 64). Regarding the ERISA § 406(a)(1)(B) claim, the Complaint alleges the ESOP Transaction was financed with a loan to the Plan from Extreme Engineering. (*Id.* ¶¶ 5, 43, 65). Regarding the ERISA § 406(a)(1)(D) claim, the Complaint alleges the Plan paid the Seller Defendants and Extreme Engineering for the stock, directly or indirectly, and thus Plan assets were transferred to them. (*Id.* ⁋⁋ 5, 9, 43, 66, 94).

These allegations state Plaintiff's prima facie case for his § 406 prohibited transaction claims. By alleging the § 406(a) elements, Plaintiff stated *per se* violations of ERISA and met his pleading burden. *See 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 v. GreatBanc Tr. Co.*, No. 17-cv-04983, 2019 WL 1468157, at *4 (N.D. Ill. Apr. 3, 2019) ("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").[2]

[2] *See also Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 434, 439 (6th Cir. 2002) ("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."); *cf.*

Plaintiff does not bear the burden of pleading around the § 408, 29 U.S.C. § 1108, affirmative defenses in his Complaint. The Seventh Circuit, in the leading decision addressing the pleading of a private company ESOP case, held:

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

Allen v. GreatBanc Tr. Co., 835 F.3d 670, 676 (7th Cir. 2016) (internal citations omitted). 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 of pleading and proof on its § 408 defenses, not Plaintiff.

The Court should therefore deny the motion to dismiss Count I.

2. <u>Count II states ERISA § 404 breach of fiduciary duty claims.</u>

As an initial matter, there is no support for the Trustee's oblique suggestion (Dkt. 19 at 8) that *Fifth Third Bancorp v. Dudenhoeffer* held motions to dismiss are any more important in ERISA cases than in any other cases or that the *Twombly/Iqbal* standard should be applied

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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)); *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 ("Section 406 of ERISA (29 U.S.C. § 1106) 'categorically bar[s] certain transactions deemed likely to injure' a plan.") (alteration in original, citation omitted).

differently in some manner favoring defendants. To the contrary, *Dudenhoeffer* rejected a "defense-friendly" presumption of prudence standard adopted by various Courts of Appeals and held ESOP fiduciaries are not entitled to any "special presumption." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 412, 418–419, 425 (2014). The Court refused to allow a pleading standard favoring fiduciary defendants that made it nearly "impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious." *Id.* at 425.

The Trustee's argument against the Count II breach of fiduciary duty claim (Dkt. 19 at 9-10) ignores the facts set out in the Complaint and obstinately declares there's nothing to see here. "In order to state a claim for breach of fiduciary duty under ERISA, the plaintiff must plead '(1) that the defendant is a plan fiduciary; (2) that the defendant breached its fiduciary duty; and (3) that the breach resulted in harm to the plaintiff.'" *Allen*, 835 F.3d at 678 (citation omitted). As explained in the previous subsection *supra*, the Complaint pleads the Trustee's fiduciary status. Count II pleads the Trustee breached its ERISA § 404(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. (Compl. ¶¶ 72-81). And the Complaint pleads the breaches of duty caused harm to the Plan and its participants, including Plaintiff. (*Id.* ¶¶ 2-5, 10, 14, 44, 48, 56, 71, 81, 103); *see also* Part IV.A.2 of Plaintiff's opposition to Seller Defendants' motion (summarizing factual allegations of breaches causing and making plausible injury in fact). The Complaint meets Plaintiff's burden. *See Allen*, 835 F.3d at 678 (sustaining fiduciary breach claim, "Although the plaintiffs could not describe in detail the process GreatBanc used, no such precision was essential. It was enough to allege facts from which a factfinder could infer that the process was inadequate."); *see also Placht*

v. Argent Tr. Co., No. 21 C 5783, 2022 WL 3226809, at *8 (N.D. Ill. Aug. 10, 2022) (denying motion to dismiss fiduciary breach claim, "the subject stock was not publicly traded, and Plaintiff asserts that the price paid did not adequately reflect its value and that the ensuing debt, financed by the Selling Shareholders, was excessive; she therefore sufficiently alleges a breach of Argent's duty of prudence").

Attempting to peel off the duty of loyalty component of the § 404 claim, the Trustee represents a narrow scope of the claim that is incorrect in this type of ESOP formation case. In ESOP actions claiming a breach of *any* of the § 404(a) duties with respect to fiduciary investment of plan assets, courts consider the merits of the investment and the thoroughness of the investigation into the merits. *See Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996) (stating further, "the inquiry into whether a fiduciary acted with loyalty and care . . . focuses on the thoroughness of the fiduciary's investigation"). Failure to act with an "eye single to the interests of participants" is at the heart of ESOP cases, and fiduciaries may breach both duties of loyalty and prudence in connection with their determination and negotiation of a stock's price. *See Perez v. Bruister*, 823 F.3d 250, 260-61 (5th Cir. 2016) (fiduciaries "breached the duties of loyalty and prudence in their conduct with respect to the stock sales"); *Chao*, 285 F.3d at 434 (duty of loyalty breached by fiduciary); *cf. Brundle v. Wilmington Tr., N.A.*, 919 F.3d 763, 779 (4th Cir. 2019) (business relationships between firms on opposing sides of transaction may have motivated trustee's poor performance). The Trustee has established no grounds to dismiss the loyalty part of Count II if the prudence part of the claim survives. Further, the Trustee's representation (Dkt. 19 at 9-10) that Plaintiff "does not allege any facts suggesting that Trustee Defendants acted in self-interest or that the Trustee Defendants received any incentives to provide an inflated valuation" is flatly wrong as the Complaint alleges Extreme Engineering under the control of Selling

Shareholders provided an unlawful indemnification agreement and appointments as the Plan's transaction trustee and ongoing trustee, and associated fees. (Compl. ⁋⁋ 17, 41, 45, 46, 54, 58–61).

3. Count III states an ERISA § 410 unlawful exculpatory provision claim and § 404 fiduciary breach claim.

The Trustee's argument that the alleged indemnification provision complies with ERISA should fail because an agreement providing indemnification for a breach of ERISA is invalid on its face under § 410(a). ERISA § 410(a) provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a). An indemnification that allows an ESOP trustee to escape liability for its violations of ERISA fits squarely within the statute. The Complaint alleges the indemnification violates § 410(a) because it "does not contain an exemption addressing violation of the per se prohibited transaction rules under ERISA § 406" and Plan-owned Extreme Engineering would be liable to indemnify the Trustee from liability for its Count I violations. (Compl. ¶¶ 58-61, 87).

The law prohibits the Trustee's indemnification agreement because it would relieve the Trustee from responsibility or liability under ERISA. Although indemnification agreements that function as insurance are allowed, indemnification cannot come from the plan itself. 29 C.F.R. § 2509.75–4. Under the majority view, indemnification by an ESOP sponsor, such as Extreme Engineering, functionally equates to an impermissible indemnification by the plan itself and is prohibited. *See Lysengen v. Argent Tr. Co.*, 498 F. Supp. 3d 1011, 1023-24 (C.D. Ill. 2020) ("Here, the company is entirely owned by the ESOP. Accordingly, the Court agrees that the indemnification would indirectly place the indemnification burden on the ESOP, which is impermissible under ERISA."); *McMaken*, 2019 WL 1468157, at *6 (agreeing with the "majority" that "indemnification of a plan fiduciary by the plan sponsor indirectly imposes a burden of the

trustee's breach of fiduciary duty on the employee stock ownership program itself"); *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"); *Pfeifer v. Wawa, Inc.*, 214 F. Supp. 3d 366, 373 (E.D. Pa. 2016) (agreeing with the "majority view" that "indemnification by an ESOP sponsor functionally equates to an impermissible indemnification by the ESOP itself"). On that basis, the motion to dismiss Count III should be denied.

The Trustee argues Count III should be dismissed because the existence of the indemnification provision is alleged on information and belief, but such allegations are sufficient here because participants are not expected to have confidential contracts such as engagement agreements between ESOP trustees and plan sponsors. As explained in Part III, *supra*, information and belief allegations are allowed, especially where, as here, the relevant information is peculiarly within the control of the defendants. *See*, *e.g.*, *Brown*, 398 F.3d at 914; *Allen*, 835 F.3d at 678 ("an ERISA plaintiff alleging breach of fiduciary duty does not need to plead details to which she has no access"). Further, indemnification agreements are a routine practice in ESOP transactions and the Complaint shows it is plausible this Trustee entered into one here. (Compl. ¶¶ 49, 62) (citing Consent Order and Judgment at 4-5, *Scalia v. Professional Fiduciary Services, LLC*, No. 7:19-cv-07874 (S.D.N.Y. Jan. 12, 2021), ECF No. 30). The motion to dismiss Count III should be denied.

V. CONCLUSION

For these reasons, the Court should deny Defendants Professional Fiduciary Services, LLC and John Michael Maier's motion to dismiss in its entirety.

Dated: November 11, 2022

Respectfully submitted,

/s/ Gregory Y. Porter

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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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