UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

SHARI AHRENDSEN, BARRY CLEMENT, and LISA BUSH, on behalf of the World Travel, Inc. Employee Stock Ownership Plan, and on behalf of a class of all other persons similarly situated,	
Plaintiffs,	**Case No. 2:21-CV-02157-HB**
v.	
PRUDENT FIDUCIARY SERVICES, LLC, a California Limited Liability Company, MIGUEL PAREDES, JAMES A. WELLS, JAMES R. WELLS, and RICHARD G. WELLS,	
Defendants.	

PLAINTIFFS' OPPOSITION TO
DEFENDANTS JAMES A. WELLS, JAMES R. WELLS, AND RICHARD G. WELLS'S
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiffs allege that in December 2017, Defendants James A. ("Jim") Wells, James R. Wells, and Richard G. Wells ("Wells Defendants") sold their shares in World Travel, Inc. ("World Travel") to the World Travel, Inc. Employee Stock Ownership Plan (the "Plan"), making World Travel 100% employee owned.[1] Amended Class Action Complaint ("Complaint" or "Compl.") ¶ 5, Dkt. 36. In Counts IV and V of the Complaint, Plaintiffs assert two claims against the Wells Defendants, in addition to prohibited transaction and fiduciary breach claims against Defendant Prudent Fiduciary Services, LLC ("PFS") and its owner Defendant Miguel Paredes (together, "the Trustee"), which authorized the stock and loan transactions on behalf of the Plan. *Id*. Count I ¶¶ 84, 85.

Specifically, in Count IV, Plaintiffs allege that the Wells Defendants participated in the ESOP stock transaction approved by the Trustee, which was a prohibited transaction under ERISA §§ 406(a)(1)(A) and (D), 29 U.S.C. § 1106(a)(1)(A) and (D), and that the Wells Defendants had actual or constructive knowledge of the elements which rendered the transaction a violation of the statute. Compl. Count IV, ¶¶ 24–29, 60–64, 81, 114–15.[2] Count V alleges that the Wells Defendants are liable as co-fiduciaries for the fiduciary breaches of the Trustee because they participated knowingly in the breaches, enabled the breaches by failing to meet their own fiduciary duty to monitor the Trustee, and had knowledge of the Trustee's breaches and failed to remedy them. *Id*. Count V, ¶¶ 60–68, 123. The only questions to address here are whether Plaintiffs meet the liberal pleading standards with respect to Counts IV and V. Wells Defs' Mot. to Dismiss ("Wells Mot."), Dkt. 45. Plaintiffs' allegations show that the Wells

[1] This stock purchase is referred to herein as the "ESOP Transaction" or "Transaction."

[2] The Trustee moved to dismiss the prohibited transaction claims against it. Trustee Mot., Dkt. 46. Plaintiffs respond to that motion in a separate, concurrently filed brief.

Defendants – who were company directors and selling shareholders – were aware of and indeed intimately involved in the ESOP Transaction from which they profited. Compl. ¶¶ 60–68. Because the Complaint clearly alleges that the Wells Defendants participated in, and thus had knowledge of the basic details of, the prohibited stock transaction caused by the Trustee, and because they were fiduciaries who participated in or enabled the fiduciary breaches of the Trustee, the motion to dismiss Counts IV and V should be denied.

II. BACKGROUND

Plaintiffs incorporate by reference the Background section articulated in Plaintiffs' concurrently filed opposition to the Trustee's motion to dismiss, at pages 2–5.

III. STANDARD OF REVIEW

Plaintiffs incorporate by reference the Standard of Review section articulated in Plaintiffs' concurrently filed opposition to the Trustee's motion to dismiss, at pages 6–7.

IV. ARGUMENT

Plaintiffs' Complaint plausibly states two claims for relief against the Wells Defendants. In determining whether a complaint's allegations plausibly demonstrate entitlement to relief, courts employ a "holistic" approach; "[t]he complaint should not be 'parsed piece by piece to determine whether each allegation, in isolation, is plausible.'" *Sweda v. Univ. of Pa.*, 923 F.3d 320, 331 (3d Cir. 2019) (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594, 598 (8th Cir. 2009)). The Complaint, viewed in its entirety, contains sufficient support to make both Counts IV and V plausible. First, Count IV details a claim against the Wells Defendants for their knowing participation in a prohibited transaction. Compl. ¶¶ 109–17. Second, Count V lays out a claim of co-fiduciary liability against the Wells Defendants for the breaches of their co-fiduciaries, Defendants PFS and Miguel Paredes. *Id.* ¶¶ 118–26. The Wells Defendants do not show that Plaintiffs failed to plead any elements of these claims; the motion to dismiss only

attempts to hold Plaintiffs to a higher standard of pleading than is required by law. Both Counts survive the motion to dismiss.

A. Count IV Adequately Asserts That the Wells Defendants Were Knowing Participants in a Prohibited Transaction

The Wells Defendants were the founders of World Travel and were shareholders and members of the World Travel Board of Directors when they sold their World Travel shares to the Plan in the ESOP Transaction at issue. Compl. ¶¶ 60, 62. Moreover, the Wells Defendants appointed the Trustee in their capacity as directors. *Id.* ¶¶ 19, 30, 52. Defendant Jim Wells controlled World Travel's operations at the time of the ESOP Transaction and prior, and he was centrally involved in conceiving of, facilitating, and executing the sale of World Travel to the Plan, including directing the preparation of financial projections underlying the stock appraisal that the Trustee relied upon. *Id.* ¶¶ 61–62. After the ESOP Transaction, the Wells Defendants retained control over World Travel as members of the Board of Directors and management team despite having sold all their shares. *Id.* ¶¶ 63–68. In fact, when the Wells Defendants sold their shares to the ESOP, they specifically received in exchange warrants to retain control of the World Travel Board of Directors. *Id.* ¶ 67.

Count IV against the Wells Defendants claims they had actual or constructive knowledge of the prohibited transactions asserted against the Trustee in Count I, meaning they knew or should have known they were parties in interest transacting with an employee benefits plan in a transaction caused by a plan fiduciary. *Id.* ¶¶ 114–15. Plaintiffs also seek appropriate equitable relief, *see* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 238 (2000), but the Wells Defendants make no arguments about that.

1. The Wells Defendants had actual or constructive knowledge of the prohibited transaction.

The Complaint plausibly alleges that the Wells Defendants knew or should have known that the ESOP Transaction contained all the elements necessary to make it a prohibited transaction under ERISA §§ 406(a)(1)(A) and (D), 29 U.S.C. §§ 1106(a)(1)(A) and (D) ("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[3]; … [or] (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan"). Indeed, the Wells Defendants, given their positions as board members, executives, and main shareholders, must have known the basic facts of the ESOP Transaction: they were 10% (or more) shareholders, directors, and executives of the company sponsoring the plan (parties in interest) selling stock to a plan in exchange for plan assets (transaction) in a transaction with the plan's fiduciary Trustee (caused by fiduciary). *See Harris Trust*, 530 U.S. at 251 (in the ERISA context, "the transferee must be demonstrated to have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful."); *Spear v. Fenkell*, No. CIV.A. 13-02391, 2015 WL 3643571, at *15 (E.D. Pa. June 12, 2015) (applying *Harris Trust*); *Haley v. Tchrs. Ins. & Annuity Assoc. of Am.*, 377 F. Supp. 3d 250, 261 (S.D.N.Y. 2019) (holding that "the most natural reading of 'actual or constructive knowledge of the circumstances that rendered the transaction unlawful' requires knowledge of the underlying *factual* circumstances relevant to lawfulness, not

[3] "The term "party in interest means, as to an employee benefit plan-- … (H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan." ERISA § 3(14), 29 U.S.C. § 1002(14).

knowledge of the *legal conclusion* that the transaction was unlawful."); *Neil v. Zell*, 753 F. Supp. 2d 724, 731–32 (N.D. Ill. 2010) (for non-fiduciaries and fiduciaries a plaintiff need only show "actual or constructive knowledge of the deal's details"). The Complaint contains precisely those allegations. The Wells Defendants were each 10% or more shareholders prior to the ESOP Transaction and each sold shares of company stock in the ESOP Transaction to the Plan represented by the fiduciary Trustee. Compl. ¶¶ 24–29, 62, 81. Thus, it is evident (and certainly more than plausible), that the Wells Defendants knew the basic terms, structure, and relevant parties involved. Indeed, all such facts would have been evident in the stock purchase agreement – the fundamental contract in every ESOP transaction – which they and the Trustee must have signed. That alone is enough to state a claim.

The Complaint goes further. The Wells Defendants were each aware of the prohibited transaction because they were all directors of World Travel at the time of the ESOP Transaction, with Defendant Jim Wells the Chairman of the Board of Directors both then and presently. *Id.* ¶¶ 24, 26, 28, 60. The titles of the Wells Defendants alone did not automatically give them knowledge of the prohibited transaction, but the specific powers and duties of the Board of Directors on which all three men sat did. The members of World Travel's Board of Directors have, and had at all relevant times, the power to appoint and remove the Trustee of the Plan, and the power to appoint and remove the Plan Administrator. *Id.* ¶ 30. The Wells Defendants, acting in their capacity as Directors, appointed Defendant PFS and its owner Defendant Miguel Paredes as the Trustee to represent the Plan in the ESOP Transaction. *Id.* ¶¶ 19, 30, 52.

Further, despite Plaintiffs' knowledge being necessarily limited at this point by the nature of the private ESOP Transaction, Plaintiffs have alleged specific actions by Jim Wells and Richard Wells that further demonstrate close awareness of the Transaction's details. First, the

idea to create an ESOP to purchase World Travel began with Defendant Richard G. Wells, who wanted to monetize his interest in the company even though the other Wells Defendants did not want to sell to a third-party purchaser. *Id.* ¶ 64. Further, Defendant Jim Wells was centrally involved in conceiving of, facilitating, and executing the sale of World Travel to the Plan which allowed Richard Wells to cash out his shares in the company while the Wells family continued to exercise control over it. *Id.* ¶ 62. This included directing the preparation of financial projections underlying the stock appraisal that the Trustee relied upon. *Id.* ¶ 64.

These allegations, taken as true, plausibly allege the Wells Defendants had the requisite knowledge of the facts surrounding a Transaction to which they were parties and which moreover implicated their express responsibilities as company Directors and Jim Wells' particular role as an officer of the Company. Based on these allegations, it would indeed be implausible to conclude that the Wells Defendants *lacked knowledge* of the Transaction.

The Wells Defendants selectively rely on *Spear*, 2015 WL 3643571, at *9–10, but the section they cite involves an alleged party in interest not analogous to the Wells Defendants. Wells Mot. at 8–9. In *Spear*, this Court dismissed a counterclaim against two parties where the "only allegation of knowledge is somehow derived from the entities' status as 'parties in interest.' … by being an 'employer any of whose employees are covered by' an ESOP plan. 29 U.S.C. § 1002(14)(C)." 2015 WL 3643571, at *9. Plaintiffs do not allege that the Wells Defendants were parties in interest merely because their employees were covered by the Plan; Plaintiffs specifically allege that the Wells Defendants "were parties in interest to the Plan under ERISA § 3(14), 29 U.S.C. § 1002(14), as 10 percent or more shareholders, directly or indirectly, of World Travel, and/or as directors, and/or as officers or individuals having powers or responsibilities similar to those of officers." Compl. ¶ 62.

Rather than support the Wells Defendants' arguments, *Spear* points to the adequacy of Plaintiffs' pleading. In a portion of the decision notably *not cited by Defendants*, the *Spear* court denied a motion to dismiss another party in interest alleged to have knowingly participated in a prohibited transaction: Barbie L. Spear, an officer and former member of the board of directors of the company in question. 2015 WL 3643571, at *9–10, *22. The court looked to ERISA § 3(14)(H), 29 U.S.C. § 1002(14)(H), the same subsection that Plaintiffs cite in their Complaint, to determine that Spear was a party in interest.[4] *Spear*, 2015 WL 3643571, at *9. The court noted that the allegations outlined actions defendant Spear took that demonstrated her knowing participation, including "facilitating the [allegedly unlawful] transactions." *Id.* at *10. Similarly, here, the Complaint outlines how the Wells Defendants formulated the plan to sell World Travel to the ESOP, set up the sale, and finalized the Transaction. Compl. ¶¶ 60–64. Here, just as in *Spear*, "[t]he pleadings allege sufficient facts 'to raise a reasonable expectation that discovery will reveal evidence of' the necessary elements.'" 2015 WL 3643571, at *10 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)).[5]

2. James R. Wells, Richard G. Wells, and Jim Wells are each on notice of the claims against them individually.

The Complaint asserts claims against each of the Wells Defendants as individuals, and the facts pleaded therein are sufficient to put each on notice as to Plaintiffs' claims against them.

[4] *Compare* ERISA § 3(14), 29 U.S.C. § 1002(14) (cited above at n.3), *with* Compl. ¶ 62.

[5] The Wells Defendants reference *Haley*, 377 F. Supp. at 250; *Laborers' Pension Fund v. Arnold*, No. 00 C 4113, 2001 WL 197634, at *8 (N.D. Ill. Feb. 27, 2001); and *Marshall v. Kelly*, 465 F. Supp. 341, 351 (W.D. Okl. 1978), in support of the same incorrect proposition that Plaintiffs rely solely on the Wells Defendants' positions within the company as the basis for their claim. Plaintiffs actually allege that the Wells Defendants' sale of their own stock in the Transaction and duties as Board members to appoint and remove the Trustee gave them sufficient knowledge to support a claim under ERISA § 406(a)(1)(A) and (D), 29 U.S.C. § 1106(a)(1)(A) and (D).

Compl. ¶¶ 24–31, 60–68, 109–26. Asserting claims against similarly situated defendants is not impermissible "group pleading" that fails to give adequate "notice," as the Wells Defendants would have it. Wells Defs. Mot. at 10. While no "bright-line rule" exists as to whether a pleading satisfies Rule 8, the Third Circuit has held that a complaint is sufficient, even if it names numerous defendants, when it "adequately puts a number of the defendants on notice of [plaintiff's] claims and makes a sufficient showing of enough factual matter (when taken as true) to plausibly suggest that [plaintiff] can satisfy the elements of his … claims." *Garrett v. Wexford Health*, 938 F.3d 69, 93, 94 (3d Cir. 2019), *cert. denied,* 140 S. Ct. 1611 (2020). Put another way, if a pleading "is so 'vague or ambiguous' that a defendant cannot reasonably be expected to respond to it," it will not satisfy Rule 8. *Id.* at 95. To be sure, under the Third Circuit's notice standard, by responding in a comprehensive fashion the Wells Defendants themselves demonstrate that they understand the claims against them. *Id.* ("Without addressing the validity of the [group] Defendants' arguments, we believe their brief demonstrates that it was possible to understand and engage with [plaintiff's] claims on their merits."). The Complaint meets the requirements of Rule 8.

While Plaintiffs frequently refer to the Wells Defendants as a group due to their similar roles in the case, each of the men is named individually in specific allegations. *See, e.g.*, Compl. ¶¶ 60–62, 64–66, 68. The knowledge Plaintiffs have at this time about each man's individual actions is laid out in detail, such as describing Jim Wells' expansive role as the Chairman of the Board of Directors and specific statements he made. *Id.* ¶¶ 61–62, 65–66. Due to all three men being on the Board and serving similar roles in the ESOP Transaction, claims against the men do overlap. This Court has allowed plaintiffs to name multiple, related defendants in their complaint when, like in the present case, the defendants were jointly involved in the alleged misconduct

and "are represented by the same counsel and jointly filed several motions to dismiss." *Commonwealth of Pa. v. Think Fin., Inc.*, No. 14-CV-7139, 2016 WL 183289, at *12 (E.D. Pa. Jan. 14, 2016). Plaintiffs' do not need to verbatim repeat their specific theories against the Wells Defendants in individual counts because Plaintiffs' theory is the same for each of them: though the men may have had greater or lesser involvement in the Transaction, each was a 10 percent or more shareholder, directly or indirectly, of World Travel and was a party in interest to the prohibited transaction. Thus, each man has liability under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), for knowing participation in the ESOP Transaction. *Supra* IV.A.1.

Plaintiffs' Complaint is markedly different from the copyright case the Wells Defendants cite, *Watkins v. ITM Recs.*, No. CIV.A. 14-CV-01049, 2015 WL 4505954 (E.D. Pa. July 24, 2015). There, the plaintiff's complaint levied every count, including "a vague allegation of commercial exploitation," against 14 diverse defendants which included Amazon.com, Wal-Mart, and AOL, Inc. *Id.*, at *3. In contrast, the Complaint here lays out specific allegations against the different defendants, with Counts I–III against the Trustee and Counts IV–V against the Wells Defendants. Compl. Counts I–V. While in *Watkins* the court found it "impossible to tease out discrete bad acts on [one defendant's] part" from the "shotgun pleading" in the complaint, *id*., here, Plaintiffs were as specific as possible in their allegations despite the fact that "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Braden*, 588 F.3d at 598.

The Wells Defendants' reference to *Ingris v. Borough of Caldwell*, No. CIV.A. 14-855 E, 2015 WL 3613499, at *5 (D.N.J. June 9, 2015), is similarly misplaced. There, the court found the complaint engaged in impermissible group pleading because the plaintiff "lumped multiple, unrelated defendants together without any explanation regarding how, if at all, specific

defendants were involved with the alleged conduct at issue" and directed every cause of action against "all defendants named in this count." *Id.*, at *5–6. Unlike in *Ingris*, where the plaintiff's pleading "involves multiple and distinct alleged incidents" and "names thirty-four defendants (many, if not most of which appear to be unrelated but for their connection to Plaintiff)", *id.*, at *6, here, Plaintiffs individually named three related people alleged to have played highly similar roles in a single ESOP Transaction. The Wells Defendants also cite the dissimilar case of *Shaw v. Housing Auth. of Camden*, No. CIV. 11-4291, 2012 WL 3283402, at *2 (D.N.J. Aug. 10, 2012), where the defendants are only listed in the parties to the action and "none are ever mentioned elsewhere in the complaint." *Id.* There, the court distinguished the vague pleading at hand from another case with "a complaint that differentiated between defendants by utilizing headings in its complaint that indicated which counts were against which defendant, with only a small number of counts against both defendants." *Id.* (citing *H2O Plus, LLC. V. Arch Personal Care Products, L.P.*, No. CIV. 10-3089, 2011 WL 2038775 (D.N.J. 2011)). The second situation is far more analogous to Plaintiffs' Complaint, where Plaintiffs brought Counts I–III against the related Trustee Defendants and Counts IV–V against the related Wells Defendants, enough to give all parties notice of the specific allegations against them. Compl. Counts I–V.

3. Confidential Witness 1's statements support Plaintiffs' allegations and are not speculation.

The Wells Defendants attack Plaintiffs' reliance on Confidential Witness 1 on various grounds. But the pleadings are not the place to resolve hearsay and reliability. The allegations based on CW1's knowledge must be taken as true at this stage in litigation, as Defendants concede. *See* Wells Mot. at 11 n.3 (acknowledging Plaintiffs may use hearsay statements in a well-pleaded complaint to establish the claim and an entitlement to relief). Plaintiffs' use of a Confidential Witness only bolsters the allegations derived from publicly available information.

In any event, none of the cases the Wells Defendants cite support a Rule 12(b)(6) dismissal. *Anselmo v. City of Phila.*, No. CV 18-5160, 2021 WL 308132 (E.D. Pa. Jan. 29, 2021) granted summary judgment to defendants on a police officer's retaliation claim which was supported *only* by a hearsay statement. *Id.* at *11. That summary judgment decision bears not at all on the sufficiency of allegations pleaded in a complaint, and in any event, it is factually distinguishable from the instant case. In another summary judgment decision, *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 298–99 (3d Cir. 2014), the court held that a witness's deficient, hearsay-based testimony at oral argument was not admissible at trial and therefore could not create a genuine issue of material fact. Again, this decision does not examine the appropriate standard for hearsay evidence at the pleading stage. *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527 (3d Cir. 2012), is also not instructive. The language cited by the Wells Defendants is merely the general pleading standard from *Twombly*[6], which the case does not go on to analyze, and the *Zavala* court did not find that the complaint lacked factual detail, but rather that the specific facts alleged (evidence of "difficult working conditions") did not rise to the legal requirement of the claim ("involuntary servitude"). 691 F.3d at 539–40.

While the Wells Defendants claim that the allegations are not detailed enough nor contain all the requisite elements, they describe a higher bar than what is prescribed by law. The Supreme Court held that, under ERISA § 406(a), 29 U.S.C. § 1106(a), a non-fiduciary only must "have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful." *Harris Trust*, 530 U.S. at 251. Thus, Plaintiffs did not need to allege that the Wells Defendants knew "about a particular *breach*," *i.e.* knowledge of the law, only the underlying

[6] *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level").

facts that constitute a breach—here a prohibited transaction in which they were primary actors. Wells Mot. at 11 (emphasis in original). Plaintiffs' level of detail in their allegations are likewise sufficient, as "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Braden*, 588 F.3d at 598; *see also Innova Hosp. San Antonio, L.P. v. Blue Cross and Blue Shield of Ga., Inc.*, 892 F.3d 719, 728–29 (5th Cir. 2018) (rejecting "overly burdensome pleading requirements in ERISA contexts").[7] Therefore, the Wells Defendants' motion to dismiss Count IV fails.

B. Count V Plausibly States a Claim for Co-Fiduciary Liability Under ERISA §§ 405(a)(1)–(3), 29 U.S.C. §§ 1105(a)(1)–(3).

Under certain circumstances, ERISA imposes liability on one fiduciary for another fiduciary's breach. Section 405(a), 1105(a) defines such co-fiduciary liability:

> A fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

ERISA § 405(a), 29 U.S.C. § 1105(a).

The Complaint alleges that the Wells Defendants, as the Directors with fiduciary authority to appoint and remove the Plan's trustee and administrator, are liable as co-fiduciaries

[7] *Cf. Frazier v. Se. Pa. Transp. Auth.*, 785 F. 2d 65, 68 (3d Cir. 1986) ("[A] court cannot expect a complaint to provide proof of plaintiffs' claims, nor a proffer of all available evidence. In civil rights cases, especially class actions, much of the evidence can be developed only through discovery. While plaintiffs may be expected to know the injuries they allegedly have suffered, it is not reasonable to expect them to be familiar at the complaint stage with the full range of the defendants' practices under challenge.").

under all three subsections of ERISA § 405(a), 29 U.S.C. § 1105(a)for the Trustee's fiduciary violations. The Wells Defendants do not contest the fact that they were fiduciaries, a requirement for co-fiduciary liability under § 1105(a). They nonetheless seek dismissal of the Count V co-fiduciary claims, challenging Plaintiffs' pleading in two ways. First, they contend the Complaint does not allege that the Wells Defendants had "actual knowledge" of the Trustee's breach of fiduciary duty and knew that it was a breach to state a claim under § 1105(a)(1) and (a)(3). Wells Mot. at 12–16. Second, they argue that the Complaint lacks allegations that the Wells Defendants' actions enabled the Trustee to also commit a fiduciary breach. *Id*. These arguments miss the mark.

1. The Wells Defendants had actual knowledge of the Trustee's breach and knew that it was a breach.

To be liable as a co-fiduciary under ERISA §§ 405(a)(1) and (3), 29 U.S.C. §§ 1105(a)(1) and (3), a fiduciary defendant must have actual knowledge of the other fiduciary's breach and that it was a breach. *See Renfro v. Unisys Corp.*, 671 F.3d 314, 324 (3d Cir. 2011) ("[S]ections 1105(a)(1) and (3) require actual knowledge of the breach … [and] that it was a breach"). Under § 1105(a)(3), a co-fiduciary's mere knowledge of another co-fiduciary's breach is sufficient for liability "unless he makes reasonable efforts under the circumstances to remedy the breach." *See Daniels v. Nat'l Emp. Benefit Servs., Inc.*, 858 F. Supp. 684, 694 (N.D. Ohio 1994) ("[All co-fiduciaries] each had knowledge of the other's breaches. Although [one co-fiduciary] itself did not engage in prohibited transactions in breach of its fiduciary duty, it is jointly and severally liable … for [its co-fiduciaries'] breaches of duty [under § 1105(a)(3)]."). Section 1105(a)(1) holds liable a co-fiduciary "if he participates knowingly in" another fiduciary's breach; a co-fiduciary willingly selling his stock in an ESOP transaction, despite knowing that another fiduciary violated its fiduciary duties in approving the transaction, violates both §§ 1105(a)(1)

and (3). *See Pizzella v. Vinoskey*, 409 F. Supp. 3d 473, 529–30 (W.D. Va. 2019) (holding a selling shareholder liable under §§ 1105(a)(1) and (3) because he "had actual knowledge that [the plan's trustee] had breached its fiduciary duty by approving a prohibited transaction" that the shareholder "participated in").

The Wells Defendants argue that the Complaint does not allege that they knew of the Trustee's breach "through knowingly participating in" a known breach by another fiduciary. Wells Mot. at 13, 15 (original emphasis omitted). This is simply not accurate. The Complaint clearly and repeatedly alleges that the Wells Defendants sold their World Travel stock to the Plan, had actual knowledge of the Trustee's failure to engage in adequate due diligence prior to the ESOP Transaction, and that the Trustee approved the stock purchase for greater than fair market value. *Supra* IV.A.1, Compl. ¶¶ 56, 58, 60–70, 123. It thus follows, as the Complaint alleges, that the Wells Defendants surely knew that the Trustee was breaching its fiduciary duty owed to the Plan and its participants because they were parties to the ESOP Transaction as Selling Shareholders. Compl. ¶ 56, 58, 123.

At the motion to dismiss stage, courts within the Third Circuit and across the country have held that even conclusory allegations of knowledge are generally sufficient to state a claim for ERISA co-fiduciary liability. *See Graden v. Conexant Sys., Inc.*, 574 F. Supp. 2d 456, 468 (D.N.J. 2008) ("Though Defendants argue that Plaintiff's allegations of knowledge are conclusory, such allegations have been found adequate by courts evaluating co-fiduciary claims on a Rule 12(b)(6) challenge."); *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 479–80 (S.D.N.Y. 2005) (denying motion to dismiss co-fiduciary claims because the "Complaint need not allege specific facts buttressing … claims of knowledge to survive a motion to dismiss"); *Hurtado v. Rainbow Disposal Co.*, No. 17-cv-01605, 2018 WL 3372752, at *14 (C.D. Cal. July

9, 2018) (denying motion to dismiss co-fiduciary claims because defendants' "arguments regarding whether Plaintiffs have adequately shown sufficient knowledge to sustain this Count are not appropriate for resolution at the pleading stage").[8]

Here, Plaintiffs' Complaint contains far more than conclusory allegations of the Wells Defendants' knowledge of the Trustee's fiduciary breaches. First and foremost, the Wells Defendants were Selling Shareholders who sold company stock to the Plan in a Transaction approved by the Trustee. Compl. ¶¶ 53, 56, 58. Further, through their role as members of World Travel's Board of Directors, and Jim Wells' particular role running the company before and after the Transaction, the Wells Defendants have, and had at all relevant times, had unique access to, and control over, the company's financial information. *Id*. ¶ 68–69, 71, 123. Defendant Jim Wells was centrally involved in the ESOP Transaction which allowed the Wells Defendants to cash out their shares in the company while the Wells family continued to exercise control over it. *Id.* ¶ 62, 64. This included directing the preparation of financial projections underlying the stock appraisal that the Trustee relied upon. *Id.* ¶ 62. Indeed, the Complaint contains the very specific allegation, based on a Confidential Witness' knowledge, that Defendant Jim Wells "was fully aware of and controlled how" the company accrued liabilities from revenue sharing agreements, *id*. ¶ 68, and further, that "World Travel did not fully report the scale of these liabilities in its financial records, or have reserves on hand to cover them, at the time of the Transaction." *Id.* ¶ 69. For the same reasons, the Complaint alleges that the Wells Defendants knew that the Trustee imprudently approved the ESOP Transaction. *Id*. ¶¶ 69, 123. In this way, the Complaint plainly alleges that the Wells Defendants also knew perfectly well that the Trustee was breaching

[8] *See also Braden*, 588 F.3d at 598 ("No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences.").

its fiduciary duties. *Id*. ¶¶ 60–70, 123. These allegations state a claim for ERISA co-fiduciary liability in the Third Circuit. *Graden*, 574 F. Supp. 2d at 468; *compare* Compl. ¶ 123 (alleging the Wells Defendants "knew or should have known of the fiduciary breaches of the Trustee"), *with Renfro*, 671 F.3d at 324 (holding that plaintiff's "claims fail because they do not contend Fidelity had knowledge about Unisys's allegedly flawed decision-making process").

2. The Wells Defendants' failure to comply with their fiduciary duties enabled the Trustee to commit a breach.

A defendant is liable as a co-fiduciary under ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2), if he fails to comply with ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), and that failure enables[9] another fiduciary to commit a breach. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), outlines the "Prudent Man Standard of Care" and requires fiduciaries to act "solely in the interest of the participants and beneficiaries" and with "care, skill, prudence, and diligence." *Id.* Under this standard, the Wells Defendants, as members of World Travel's Board of Directors with the power to appoint and remove the Trustee, had a duty to monitor the Trustee and ensure that the Trustee was complying with its fiduciary obligations. *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 164–65 (E.D. Pa. 2009) ("One such duty [under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)], is the duty to monitor other plan fiduciaries."); *Graden*, 574 F. Supp. 2d at 466 ("ERISA imposes upon those individuals empowered to appoint and remove plan fiduciaries a fiduciary duty to monitor those fiduciaries.").

The Complaint alleges sufficient facts to plausibly support that the Wells Defendants "enabled the Trustee's fiduciary breach by themselves failing to monitor as required of an

[9] The Wells Defendants mischaracterize what ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2), requires; the statute does not require that a defendant "*cause* a co-fiduciary to also commit a breach," Wells Mot. at 14–15, but rather that "he has *enabled* such other fiduciary to commit a breach." ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2) (emphasis added).

appointing fiduciary." Compl. ¶ 123. As the Complaint details, the Wells Defendants sold their shares to the Plan for over $200 million, an above fair market price, in the ESOP Transaction. *Id.* at ¶ 56, 59. Because the Wells Defendants acted with their own financial gain in mind, rather than that of the Plan participants, the Transaction "primarily benefited the Selling Shareholders to the substantial detriment of the Plan and its participants and beneficiaries." *Id.* ¶ 87. Defendant Jim Wells was "centrally involved in conceiving of, facilitating, and executing the sale of World Travel to the Plan." *Id.* ¶ 62. Further, the Complaint lays out the motivation behind at least Richard G. Wells' failure to act: he wanted to "monetize his interest in the company" without "divest[ing] their [the Wells Defendants'] control over it." *Id.* ¶ 64. The Wells Defendants did not act with diligence required of fiduciaries nor "solely in the interest of the participants and beneficiaries" as required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), when they failed to monitor the Trustee.

Defendants' cited case, *Askew v. R.L. Reppert, Inc.*, 902 F. Supp. 2d 676 (E.D. Pa. 2012)[10], is easily distinguishable. In *Askew*, the factual allegations in the third-party complaint were so minimal that the court was unable to determine whether the third-party defendants were fiduciaries, the "nature of the contracts between third-party plaintiffs" and defendants, "the extent of any discretionary tasks performed by third-party defendants," or any "actions or omissions by" the third-party defendants. *Askew*, 902 F. Supp. 2d at 685. Here, Plaintiffs clearly laid out in their Complaint the relationship between Defendant PFS and its owner Defendant

[10] This Court in *Askew* stated that, for an ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2), claim, "a plaintiff must aver sufficient factual matter to support a reasonable inference that that the first fiduciary's breach caused his co-fiduciary to also commit a breach." 902 F. Supp. 2d at 687 (citing *Renfro,* 671 F.3d at 324 n.5)). Plaintiffs respectfully suggest that this Court used the terms "caused" and "enabled" (from the statute) interchangeably, rather than *Askew* establishing a new, heightened requirement. *Renfro* does not discuss any requirements about the relationship between the co-fiduciaries' breaches. 671 F.3d at 324 n.5.

Miguel Paredes, the Trustee, and the Wells Defendants as members of the World Travel Board of Directors. Compl. ¶¶ 8, 19, 30. Plaintiffs detailed, to the best of their ability pre-discovery, actions and statements of the Wells Defendants, individually and together, with regard to the ESOP Transaction. *Id.* ¶¶ 62–64. Therefore, the comparison to *Askew* fails, as does the Wells Defendants' motion to dismiss Count V.

V. CONCLUSION

For the foregoing reasons, the Wells Defendants' Motion to Dismiss should be denied. In the event the Court grants any part of the motion, Plaintiffs respectfully request leave to amend.

Dated: October 14, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 2021, a copy of the foregoing document was served on all counsel of record via ECF.

/s/ Patricia Mulvoy Kipnis
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