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,** **v.** **PRUDENT FIDUCIARY SERVICES, LLC, a California Limited Liability Company,** **MIGUEL PAREDES,** **JAMES A. WELLS,** **JAMES R. WELLS, and** **RICHARD G. WELLS,** **Defendants.**	**Case No. 2:21-CV-02157-HB**

PLAINTIFFS' OPPOSITION TO
DEFENDANTS PRUDENT FIDUCIARY SERVICES AND MIGUEL PAREDES'S
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiffs' principal claims—under § 406(a)(1)(A) and (D) of the Employee Retirement Income Security Act (ERISA)—allege prohibited transactions in a $200,573,217 stock purchase by an employee stock ownership plan (ESOP) from party in interest directors and "10 percent or more shareholders" who transacted directly or indirectly with the fiduciary trustee hired to represent the ESOP by the company the parties in interest controlled. 29 U.S.C. § 1106(a)(1)(A), (D). On such allegations, Plaintiffs necessarily state their § 406 *prima facie* case on those claims. The Court need go no further than the admission of the trustee, Defendant Miguel Paredes and his company Defendant Prudent Fiduciary Services, LLC ("PFS", and together "the Trustee"), of these facts to deny its motion to dismiss the Count I claims.[1]

Nevertheless, the Trustee filed a frivolous motion to dismiss (Dkt. 46) those claims (and other claims) asking the Court to defy two precepts: (1) the § 406 prohibited transaction rules "bar categorically" certain transactions Congress found "likely to injure the pension plan," including under § 406(a)(1)(A) and (D) "transactions for the purchase of employer stock on behalf of an employee benefit plan by a plan fiduciary,"[2] and (2) it is not plaintiffs but *defendants* who bear burdens of pleading and proof on affirmative defenses, including the § 408 exemptions from the § 406 prohibitions.[3] Nearly 50 years after ERISA's adoption, these precepts

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[1] *See* Def. Br., Dkt. 46-1 at 3 (admitting, "An ESOP's purchase of stock is technically a 'prohibited transaction' under ERISA section 406(a), which prohibits a fiduciary from 'caus[ing] the plan to engage in' the 'sale or exchange . . . of any property between the plan and a party in interest[,]' ….").

[2] *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 160 (1993); *Perez v. First Bankers Tr. Servs., Inc.*, No. 12-4450, 2017 WL 1232527, at *72, *79 (D.N.J. Mar. 31, 2017); *see also Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241–42 (2000); *Sweda v. University of Pa.*, 923 F.3d 320, 327, 336 (3d Cir. 2019); *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 82, 92 (3d Cir. 2012); 29 U.S.C. § 1106(a)(1)(A), (D).

[3] *See Jones v. Bock*, 549 U.S. 199, 216 (2007); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Williams v Runyon*, 130 F.3d 568, 573 (3d Cir. 1997); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 446 (3d Cir. 1996); *Swain v. Wilmington Tr., N.A.*, No. 17–71, 2017 WL 3475713, at *6 (D. Del. Aug. 14, 2017), *adopted and rejected in part by Swain v. Wilmington Tr., N.A.*, No. 17–71, 2018 WL 934598 (D. Del. Feb. 16, 2018); *Perez v. First Bankers Tr. Servs., Inc.*, No. 12-4450, 2017 WL 1232527, at *80 (D.N.J. Mar. 31, 2017); *Goldenberg v. Indel Inc.*, 741 F. Supp. 2d 618, 632 (D.N.J. 2010).

cannot be legitimately questioned, notwithstanding the Trustee's griping that the strict protections Congress enacted in response to "deficiencies in prior law regulating transactions by plan fiduciaries"[4] subject plan fiduciaries to onerous regulation. Indeed, counsel for Plaintiffs and counsel for the Trustee have debated the Trustee's unorthodox theories in other private company ESOP cases, and the courts have rejected them as contrary to the law and held similar complaints stated plausible claims for relief.[5] Under ERISA's plain terms and the governing case law, this Court should do so as well.

With respect to Count II, the Court should see through the Trustee's attempt to falsely frame prototypical breach of fiduciary duty claims (prudence and loyalty) as fraud claims. And Plaintiffs, who are plan participants and not plan insiders, are *not* held to an impossible standard of having to allege facts about trustee due diligence processes and business information relevant to the value of employer stock that are not public, but known only to insiders. Count II and Plaintiffs' other claims plausibly state claims for relief under the applicable pleading standards. The Court should deny the Trustee's motion to dismiss in its entirety.

II. BACKGROUND

Contrary to Congress' good intentions and the Trustee's idealized picture of what should be happening in the ESOP world, there are pervasive problems with the service providers who make a trade in creating ESOPs at the behest of selling shareholders looking for a way to cash out of their businesses in overpriced, non-market transactions. The Employee Benefits Security

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[4] *Harris Trust*, 530 U.S. at 241–42.

[5] *See 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, 2017 WL 3475713 (D. Del. Aug. 14, 2017), *as adopted and rejected in part by 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).

Administration (EBSA) has therefore since 2005 identified ESOPs as a "national enforcement project" in which its field offices are placing "particular investigative emphasis." EBSA, National Enforcement Projects, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement (last visited Sept. 24, 2021). Tim Hauser, Deputy Assistant Secretary for Program Operations of EBSA, explained:

> We believe there is a chronic problem with ESOP appraisals. To address this problem, we have increased the level of scrutiny of ESOP appraisals. . . . The number of suits that we have filed to recover ESOP losses simply reflects the number of egregious cases that we have seen. . . . The bottom line is that we want ESOP transactions to occur at the right price and be in the best interest of the plan.

Frank (Chip) Brown, *Q&A with Tim Hauser of the U.S. Department of Labor*, Insights, Spring 2015, at 75, http://www.willamette.com/insights_journal/15/spring_2015_8.pdf. EBSA Assistant Secretary Phyllis C. Borzi reported further:

> One of the most common fiduciary violations with respect to Employee Stock Ownership Plans (ESOPs) is the incorrect valuation of private company employer securities. This can occur when purchasing, selling, distributing, or otherwise valuing the employer's securities. EBSA has uncovered abuses reflecting flawed valuation methodologies, internally inconsistent valuation reports, the use of unreliable and outdated financial data, and even apparent manipulation of data and valuation methodologies. These problems are particularly serious in ESOPs because they are designed to invest primarily in employer stock.

Letter from Phyllis C. Borzi, Assistant Secretary, EBSA, to Technical Director, Financial Accounting Standards Board (May 30, 2013).[6] Announcing a 2020 settlement in which ESOP trustee Wilmington Trust paid the losses of twenty-one ESOPs that EBSA found paid more than

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[6] Available at, https://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175827008790&blobheader=application%2Fpdf&blobheadername2=Content-Length&blobheadername1=Content-Disposition&blobheadervalue2=1763016&blobheadervalue1=filename%3DFVMPCEBP.ED.0055.U.S._DEPARTMENT_OF_LABOR_PHYLLIS_C._BORZI.pdf&blobcol=urldata&blobtable=MungoBlobs#:~:text=One%20of%20the%20most%20common%20fiduciary%20violations%20with,or%20otherwise%20valuing%20the%20employer%27s%20securities.%20EBSA%20has.

fair market value for employer stock, Assistant Secretary Preston Rutledge emphasized:

> An employee stock ownership plan's promise of retirement income for workers depends on paying a fair price for an employer's stock, and fiduciaries hired to represent an ESOP must satisfy their responsibilities to prevent them from paying more. . . . The department's actions here reflect its commitment to protecting the retirement income of ESOP participants, and holding accountable fiduciaries who fail to satisfy their obligations.

News Release, EBSA, Sec. of Labor Reaches Agreement, Release No. 20-796-NAT (Apr. 30, 2020), https://www.dol.gov/newsroom/releases/ebsa/ebsa20200430.

Congress empowered plan participants to bring suits to protect their ESOPs. *See* 29 U.S.C. § 1132(a)(2). Plaintiffs' counsel prosecuted a leading ESOP participant suit that brought to light significant problems in the ESOP-creation community, winning a $29.7 million trial judgment against Wilmington Trust that the Fourth Circuit affirmed. *See Brundle v. Wilmington Tr., N.A.*, 919 F.3d 763 (4th Cir. 2019). The *Brundle* court found "'the ESOP world [is] a very incestuous community'" because of the "significant long-term business relationships" resulting from parties working together in many ESOP deals. *Id.* at 771 (quoting *Brundle v. Wilmington Tr. N.A.*, 241 F. Supp. 3d 610, 643 (E.D. Va. 2017)). *Brundle* demonstrates that the problems EBSA describes above are commonplace because trustees for buyer-side ESOPs are hired by *seller-controlled* companies on the recommendation of *seller-side* financial and ESOP transaction advisors with whom trustees maintain "extensive and lucrative business relationships." 919 F.3d at 779. ESOP trustees also incorrectly contend en masse 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), by which ESOPs suffer as a result. *Brundle*, 241 F. Supp. 3d at 637.

This is another such case. The Amended Class Action Complaint ("Complaint") (Dkt. 36) alleges an "ESOP Transaction" in which the World Travel, Inc. Employee Stock Ownership Plan (the "Plan") purchased 19,860,000 shares of World Travel, Inc. ("World Travel") common stock for $200,573,217 from parties in interest James A. ("Jim") Wells, James R. Wells, and Richard G. Wells (together, the "Selling Shareholders"), and financed the transaction with a loan from World Travel, on or about December 20, 2017. (Compl. ¶¶ 5, 24–29, 56, 59). Plaintiffs Shari Ahrendsen, Barry Clement, and Lisa Bush are Plan participants who were vested in the shares of World Travel allocated to their individual accounts in the Plan. (Compl. ¶¶ 2, 13–15). The Plan is an ESOP, a pension plan, and an individual account plan, or defined contribution plan, under ERISA. (Compl. ¶¶ 36–38). The Trustee, Defendant Paredes and his company Defendant PFS, was the Plan's fiduciary trustee with authority to negotiate and approve the Transaction on behalf of the Plan. (Compl. ¶¶ 1, 6, 17–21, 52, 81, 84).

The Complaint alleges the Trustee's authorization of the ESOP Transaction violated ERISA's prohibited transaction and fiduciary duty rules, and seeks any Plan losses arising from those breaches of ERISA. (Compl. ¶¶ 3, 9, 10, 80-100). Count I alleges five distinct violations of the § 406 prohibited transaction rule by the Trustee. (Compl. ¶¶ 80–92). The Plan's Form 5500 filings state, under penalty of perjury, the Plan's investment in World Travel common stock and indebtedness guaranteed by World Travel are party-in-interest transactions. (Compl. ¶ 49). Count II alleges the Trustee breached its ERISA § 404(a) fiduciary duties in the ESOP Transaction by conducting an inadequate investigation and approving the Plan's purchase of stock for more than fair market value. (Compl. ¶¶ 93-100). Count III alleges payment by World Travel, which the Plan owns, of the Trustee's losses and legal fees in this lawsuit pursuant to an indemnification agreement executed when the Selling Shareholders owned the company would harm the Plan and violate the ERISA § 410, 29 U.S.C. § 1110, prohibition on exculpatory contracts and § 404 fiduciary provisions, 29 U.S.C. § 1104. (Compl. ¶¶ 76-79, 101-108). In Count IV, Plaintiffs bring § 502(a)(3) claims against the Selling Shareholders for participating in the stock transaction prohibited by § 406(a)(1)(A) and (D). (Compl. ¶¶ 109–117). Count V asserts the Selling Shareholders are liable as co-fiduciaries for the Trustee's breaches of ERISA. (Compl. ¶¶ 118-126). Plaintiffs now oppose the Trustee's motion to dismiss (Dkt. 46).

III. STANDARD OF REVIEW

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)). This is not a "probability requirement." *Iqbal*, 556 U.S. at 678. Rather, the factual allegations should "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A court must draw all reasonable inferences in the plaintiff's favor and take the plaintiff's factual allegations as true. *See id.* at 678–79; *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 783 n.1, 786 n.2, 790–91 (3d Cir. 2016).

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. University 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)). A "holistic evaluation of an ERISA complaint's factual allegations" is counseled by participants' "limited access to crucial information" regarding "facts which tend systemically to be in the sole possession of defendants." *Braden*, 588 F.3d at 598.

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 v. GreatBanc Tr. Co*., 835 F.3d 670, 678 (7th Cir. 2016) (ESOP case); *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) (explaining "ERISA plaintiffs should not be held to an excessively burdensome pleading standard," rejecting "overly burdensome pleading requirements in ERISA contexts"); *Braden*, 588 F.3d at 598 ("ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences"). Pleadings on "information and belief" are allowed under the Federal Rules of Civil Procedure and are especially warranted where facts are exclusively within the knowledge or control of insiders, not plaintiffs. *See also McDermott v. Clondalkin Grp., Inc.*, 649 F. App'x 263, 267-68 (3d Cir. 2016); *Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 107 n.31 (3d Cir. 2015); Fed. R. Civ. P. 11(b)(3).

IV. ARGUMENT

A. The Motion to Dismiss Count I Fails Because Plaintiffs Need Not Negate Affirmative Defenses and Have Pled Plausible Claims to Relief.

Count I of the Complaint alleges violations of five distinct sections of ERISA's prohibited transaction rule: ERISA §§ 406(a)(1)(A), 406(a)(1)(B), 406(a)(1)(D), 406(b)(2), and 406(b)(3). (Compl. ¶¶ 80-92). The Trustee does not show Plaintiffs failed to plead the § 406 elements of their prohibited transaction claims. The Trustee's arguments against Count I instead prematurely raise its affirmative defenses, which are not properly considered on this motion and are not proved on the Complaint and documents properly before the Court. All five prohibited transaction claims survive the Trustee's motion to dismiss.

1. The ERISA § 406(a)(1)(A) Claim.

Plaintiffs' principal claim is that the Trustee's authorization of the Plan's purchase of World Travel stock from the party in interest Selling Shareholders on or about December 20, 2017, was prohibited by ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A). (*See, e.g.*, Compl. ¶¶ 5-9, 81, 84, 85). 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 their § 406(a)(1)(A) claim, Plaintiffs must prove: (1) the Trustee was a fiduciary that caused, (2) the Plan to purchase World Travel stock, (3) from parties in interest. *Id.*; *Sweda*, 923 F.3d at 335 ("The elements of a party-in-interest, prohibited transaction claim are: (1) the fiduciary causes (2) a listed transaction to occur (3) between the plan and a party in interest.").

The Trustee does not challenge the Complaint on *any* of these elements.[7] To the contrary, it admits that ESOP stock purchases from parties in interest are prohibited transactions. (Def. Br., Dkt. 46-1 at 3 (admitting, "An ESOP's purchase of stock is technically a 'prohibited transaction' under ERISA section 406(a), which prohibits a fiduciary from 'caus[ing] the plan to engage in' the 'sale or exchange . . . of any property between the plan and a party in interest[,]' ….."). On that admission alone, the Court should deny the motion to dismiss this claim.

Plaintiffs clearly state a prohibited transaction claim by alleging the elements of a § 406(a) transaction; the Trustee's suggestion that the Court should impose additional

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[7] The Complaint contains ample allegations of the Trustee's fiduciary status and authority (Compl. ¶¶ 6-7, 16-21, 52-53, 81, 84), the Selling Shareholders' party in interest status (*id.* ¶¶ 8, 24-30, 49, 60, 81, 83), and that the Trustee caused the ESOP to enter into a 2017 stock transaction (*id.* ¶¶ 3, 5-6, 9, 81, 83-85, 92). The Trustee's representation that the Complaint alleges only "a single fact" is just silly. (Def. Br. at 1). The 28-page Complaint alleges all the elements of five prohibited transaction claims, and much more. Further, the Trustee's allegation that "nearly every allegation" in the Complaint is made "on information and belief," while citing just 7 paragraphs out of 134, is hyperbole. (Def. Br. at 7-8). And Plaintiffs are allowed to make allegations "on information and belief." *See* Part III, *supra*. Even if they weren't, such allegations in the Complaint are primarily related to affirmative defenses that Plaintiffs have no burden to negate. Courts have rejected defense counsel's argument that similar prohibited transaction allegations violate applicable pleading requirements, including under Rule 11. *See, e.g.*, *Blackwell v. Bankers Tr. Co. of S.D.*, No. 3:18-CV-141, 2019 WL 1433769, at *2-4 (S.D. Miss. Mar. 29, 2019).

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); *see also Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241–42 (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'"); *Sweda*, 923 F.3d at 327, 336 ("Section 1104(a) lays the foundation of fiduciary duty, and § 1106(a) '[s]upplement[s] that foundational obligation' by 'erect[ing] a categorical bar to transactions between the plan and a party in interest deemed likely to injure the plan.'") (citation omitted, alterations in original); *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 82, 92 (3d Cir. 2012). The sale of stock to the Plan by the party in interest Selling Shareholders is prohibited under the plain terms of § 406(a)(1)(A) and is the very type of transaction that inspired the prohibited transaction rules. The Supreme Court has explained that in enacting the 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." *Keystone*, 508 U.S. at 160 (citing S.Rep. No. 93–383, pp. 95–96, U.S.Code Cong. & Admin.News 1974, p. 4639 (1973)). There can be no question that such a transaction is categorically barred by § 406(a)(1)(A). *See also Perez v. First Bankers Tr. Servs., Inc.*, No. 12-4450, 2017 WL 1232527, at *72, *79 (D.N.J. Mar. 31, 2017) (leading private company ESOP case in Third Circuit, holding transaction categorically barred by § 406(a)(1)(A)

& (D)). By alleging the § 406(a)(1)(A) elements, Plaintiffs have therefore stated a violation of ERISA and met their pleading burden.

The Trustee says Plaintiffs haven't pled around its affirmative defense under ERISA § 408(e), that is, they haven't pled facts showing the Plan paid more than "adequate consideration" for the stock.[8] (Def. Br. at 2, 13–16). But Plaintiffs don't have to. It is black letter law that defendants, *not* plaintiffs, bear the burden of pleading and proof on affirmative defenses.[9] As courts in this Circuit have held, the defendant, and not the plaintiff, has the burden on such ERISA § 408 affirmative defenses.[10] 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 affirmative defenses for pleading purposes, and so the plaintiff has no duty to negate any or all of them.

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[8] The § 408(e) exemption claimed by the Trustee 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 . . . and . . . if . . . the plan is an eligible individual account plan (as defined in section 407(d)(3))." 29 U.S.C. § 1108(e). In the case of "an asset other than a security for which there is a recognized market," as in this case, adequate consideration is defined as "[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). "Adequate consideration" thus requires proof of the intertwined prongs that (1) a plan paid no more than fair market value for a stock and (2) the fair market value was determined in a good faith investigation. *See First Bankers*, 2017 WL 1232527, at *80 & n.70.

[9] *See Jones v. Bock*, 549 U.S. 199, 216 (2007) ("We conclude that failure to exhaust is an affirmative defense … and that inmates are not required to specially plead or demonstrate exhaustion in their complaints."); *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."); *Williams v Runyon*, 130 F.3d 568, 573 (3d Cir. 1997) ("Because failure to exhaust administrative remedies is an affirmative defense, the defendant bears the burden of pleading and proving that the plaintiff has failed to exhaust administrative remedies.").

[10] *See In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 446 (3d Cir. 1996) (applying authority that defendants bear burden on § 408 defenses to another ERISA exception); *Swain*, 2017 WL 3475713, at *6 (report and recommendation later adopted in relevant part, holding: "ERISA § 408 provides affirmative defenses, and such defenses, must be plead by defendant. They need not be 'plead[ed] around' by plaintiffs. Thus, Wilmington Trust's motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) should be denied for plaintiffs' claims under ERISA § 406(a)(1)(A)–(B)"); *First Bankers*, 2017 WL 1232527, at *80 ("It is the fiduciary's burden to prove that the ESOP received 'adequate consideration' for its purchase of company stock"); *Goldenberg v. Indel Inc.*, 741 F. Supp. 2d 618, 632 (D.N.J. 2010) (holding § 408 exceptions are affirmative defenses and defendants' burden, denying 12(b)(6) motion arguing complaint's failure to negate defense).

Allen v. GreatBanc Tr. Co., 835 F.3d 670, 676 (7th Cir. 2016) (internal citations omitted) (denying motion to dismiss). A sister court held likewise on a motion argued by the Parties' instant counsel. *See Swain*, 2017 WL 3475713, at *6. 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(c)(1). The Trustee bears the burden on its § 408 defense, not Plaintiffs.[11]

Sweda does not except this case from these rules. In *Sweda*, the Third Circuit narrowly added an element of "intent to benefit a party in interest" to the elements required under the distinct § 406(a)(1)(C) provision to avoid the "absurd" result that a service provider could face liability for accepting payment in "ubiquitous service transactions." 923 F.3d at 336-38, 340. *Sweda* is distinguishable because there is no § 406(a)(1)(C) claim in this lawsuit, nor does Plaintiffs' § 406(a)(1)(A) claim concern commonplace goods or services transactions between a plan and a service provider. *Sweda* suggests no pleading requirement outside the § 406(a)(1)(A) elements where the transaction at issue is a plan's multimillion dollar stock purchase from its sponsor's founders/directors. The Third Circuit itself distinguished private company ESOP litigation, as featured here and in *Allen*, from a § 406(a)(1)(C) claim concerning ordinary

[11] *See also Brundle*, 919 F.3d at 770 ("Because an ESOP fiduciary that raises an affirmative defense under the § 1108(e) exception seeks to avoid ERISA liability for an otherwise prohibited transaction, the fiduciary bears the burden of proving by a preponderance of the evidence that the sale was for adequate consideration."); *Perez v. Bruister*, 823 F.3d 250, 262 (5th Cir. 2016) ("This means that an ESOP may acquire employer securities in circumstances that would otherwise violate Section 406 if the purchase is made for 'adequate consideration.' The fiduciaries have the burden to prove this affirmative defense.") (internal citation, punctuation omitted); *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 619 (2d Cir. 2006) ("Under ERISA, the fiduciary bears the burden of proving by a preponderance of the evidence that the ESOP received 'adequate consideration' for its purchase of company stock."); *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996) ("A fiduciary who engages in a self-dealing transaction pursuant to 29 U.S.C. § 1108(e) has the burden of proving that he fulfilled his duties of care and loyalty and that the ESOP received adequate consideration. This burden is a heavy one.") (internal citations omitted); *Donovan v. Cunningham*, 716 F.2d 1455, 1467-68 (5th Cir. 1983) ("it seems 'fair and reasonable' to place the burden of proof upon a party who seeks to bring his conduct within a statutory exception to a broad remedial scheme").

services that motivated its unusual holding in *Sweda*. 923 F.3d at 336 ("One of the reasons we do not find *Allen* persuasive is that the transactions the Seventh Circuit scrutinized in *Allen* were a far cry from the ordinary service arrangements at issue here"). The Court explained that § 406(a)(1) "was designed to prevent 'transactions deemed likely to injure the ... plan' and 'self-dealing.'" 923 F.3d at 336 (citation omitted). The stock transaction here, in contrast to the transaction in *Sweda*, is precisely the type of transaction Congress contemplated as likely to injure a plan when it crafted its categorical bar. *See Keystone*, 508 U.S. at 160; *see also First Bankers*, 2017 WL 1232527, at *72, *79 (ESOP stock transaction categorically barred by § 406(a)(1)(A) & (D)); *cf. Sweda*, 923 F.3d at 338 ("Section 1106(a)(1) is not meant to impede necessary service transactions, but rather transactions that present legitimate risks to participants and beneficiaries"). Finally, the Trustee's suggestion that *Sweda* supports the shifting of the burden on the § 408(e) affirmative defense to Plaintiffs misrepresents the decision, which did not shift the burden on a defense but required an additional allegation to state the specific claim at issue. As noted above, Supreme Court and Third Circuit caselaw unequivocally hold the burden of pleading and proof on an affirmative defense is the defendant's, *not* the plaintiff's.[12]

The Trustee also argues (Def. Br. at 9-11, 14 n.11, 16) that the Plan's payment of no more than fair market value, which is one of the two prongs of the adequate consideration defense, is proved on a Plan Form 5500 under *Lee v. Argent Trust Co.*, No. 5:19-CV-156, 2019 WL 3729721 (E.D.N.C. Aug. 7, 2019), but that outlier is both distinguishable and wrong:

[12] The Trustee also cites *Leventhal v. MandMarblestone Grp. LLC*, No. 18-cv-2727, 2020 WL 2745740 (E.D. Pa. May 27, 2020), but it does not stand for the proposition that plaintiffs must plead around affirmative defenses. And *Leber v. Citigroup, Inc.*, No. 07 Civ. 9329, 2010 WL 935442 (S.D.N.Y. Mar. 16, 2010), is, like *Sweda*, inapposite because it concerned a § 406(a)(1)(C) claim. *Id.* at *9. To the extent *Leber* holds a plaintiff must negate a defense, it conflicts with the precedent from this and other circuits cited above and has been criticized as a deviation. *See Krueger v. Ameriprise Fin., Inc.*, No. 11-cv-02781, 2012 WL 5873825, at *17 (D. Minn. Nov. 20, 2012). *Leber* was a very different case where exemptions PTE 77-3 and § 408(b)(2) concerned plan fees, which ERISA requires to be disclosed to participants. *See* 29 C.F.R. § 2550.404a-5(d)(1)(iv). *Leber* did not impose an impossible standard that a plaintiff must plead insider information to which he did not have access, as the Trustee espouses here.

1. This case is distinguishable from *Lee*. Plaintiffs here do not allege a post-Transaction drop in stock valuation is evidence the Plan paid more than fair market value. Plaintiffs do not assume *any* valuation overseen by the Trustee, in the Transaction *or* after, is accurate; rather, they allege the Trustee did not perform adequately. Here it is the defendant that relies on a post-transaction valuation, but it is well-established that the Court may not take judicial notice of the stock value reported in the 2017 Form 5500 (Ex. 1, Dkt. 46-3)[13] for its truth. *See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999) (court may take judicial notice of a public record, not for the truth of the facts recited therein, but for the record's existence). The 2017 Form 5500 provides no basis for dismissal.
2. *Lee*'s conclusion that if an ESOP's stock does not remain at a valuation of 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, is simply wrong. 2019 WL 3729721, at *4. The Trustee is trying to bamboozle this Court into a holding that would mean participants in fully-leveraged ESOPs likely will never be able to show injury, as ESOPs always allocate some stock to participants' accounts soon after a transaction, so it is unlikely the stock value reported in an initial Form 5500 will be zero. Even after a fully leveraged transaction, the value of company stock reported to EBSA will be positive because money or unencumbered stock will be set aside to allocate stock to participants – employers are rightly loath to announce the sale of their companies to their employees in

[13] The Trustee did not attach a complete copy of the 2017 Form 5500 filing to its motion, as it excluded Financial Statements and Supplemental Schedules.

multimillion dollar transactions while rolling out an ESOP in which the employees do not own any stock in the company. It doesn't happen.

3. *Lee* does not understand the measure of plan losses in this type of case. An ESOP's losses are calculated by subtracting the actual fair market value on the date of the transaction from what the plan paid for the securities. *See Perez v. Bruister*, 823 F.3d 250, 258, 265–66 (5th Cir. 2016); *Brundle*, 919 F.3d at 781; *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 420, 444 (6th Cir. 2002); *First Bankers*, 2017 WL 1232527, at *81. Whether the value of ESOP stock reported to EBSA as of days or weeks after a transaction is or is not above zero says nothing about whether the ESOP overpaid at the time of the transaction. As noted, shares will be allocated to participants' accounts and the reported value will thus be positive, but that does not mean the plan did not overpay on the transaction date.

4. *Lee*'s holding that injury-in-fact cannot be shown where a stock's value "actually *appreciated*" (2019 WL 3729721, at *4) soon after an ESOP transaction is plain error, as an overpayment on company stock by an ESOP is not offset by later events such as subsequent stock gains or debt forgiveness. *See Brundle*, 919 F.3d at 782-83; *Bruister*, 823 F.3d at 270-71; *Henry v. U.S. Trust Co. of Cal., N.A.*, 569 F.3d 96, 98–100 (2d Cir. 2009). Even if World Travel stock appreciated in the ten or eleven days after the Transaction, that would not mitigate the Plan's losses.

5. The Trustee's theory of fair market value is "voodoo economics" meriting expert rebuttal, and cannot be adopted as the basis for a Rule 12(b)(6) dismissal. Plaintiffs posit Defendant Paredes's representation that the Plan paid less than fair market value because its stock was valued above zero at year end 2017 demonstrates his ignorance

> of basic valuation methods, an unfortunate trait in an ESOP trustee. To assess Paredes's argument, the Court should be provided analyses that will only be possible with fact and expert discovery into Paredes's theory and related methods, acts and omissions.

That the reported value of the Plan's stock was above zero days after the Transaction is thus not the "magic bullet" the Trustee urges. The Court should disregard *Lee*, a true outlier, as poorly-reasoned bad law and as factually distinct as to the allegations of the respective complaints.[14]

2. The ERISA § 406(a)(1)(B) Claim.

Count I also alleges the Trustee's authorization of the Plan's loan from World Travel was prohibited by ERISA § 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B). (Compl. ¶¶ 82, 84, 85). The Trustee's argument for dismissal of this claim is relegated to a single footnote. (Def. Br. at 16 n.12). The argument makes little sense, reciting certain alleged truisms that Plaintiffs allegedly "overlook" and attacking straw men. To the extent the Trustee is claiming the §§ 408(b)(3), 408(b)(17), or 408(e) affirmative defenses may be applied on this motion because the Complaint failed to negate them, the argument must fail for the same reasons stated in Part IV.A.1 *supra*. That is, the Trustee bears the burden of proof on its affirmative defenses and Plaintiffs were not required to negate them. Such affirmative defenses are not proved on the face of the Complaint.

3. The ERISA § 406(a)(1)(D) Claim.

Similar to the § 406(a)(1)(A) claim, Plaintiffs' § 406(a)(1)(D) claim challenges the 2017 stock transaction under a different prohibited transaction rule. (Compl. ¶¶ 83-85). The Trustee's argument for dismissal is again demoted to the footnote, which refers to its § 406(a)(1)(A) argument. (Def. Br. at 16 n.12). The Court should deny the motion to dismiss the § 406(a)(1)(D)

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[14] Notably, *Lee v. Argent* is the only private company ESOP formation case the Trustee musters that was dismissed under Rule 12(b)(6). In contrast, Plaintiffs cite many similar ESOP cases where dismissal was denied.

claim for the same reasons briefed above, to wit, Plaintiffs have stated their § 406 *prima facie* claim and the affirmative defense cannot be resolved on the instant motion.

4. The ERISA § 406(b)(2) Claim.

Plaintiffs' ERISA § 406(b)(2) claim alleges the Trustee acted for the benefit of the Selling Shareholders in a transaction in which they were adverse to the Plan. (Compl. ¶¶ 7, 67, 73, 75, 86, 87, 89). The Trustee's one paragraph, *pro forma* argument for dismissal of this claim argues that Plaintiffs have provided "just a recitation of the elements of the claim." (Def. Br. at 17). But Plaintiffs plainly have pled a plausible claim to relief.

In a decision by a sister court involving the same plaintiff and defense firms appearing here (Bailey & Glasser and Groom Law Group), the court denied the defendant's motion to dismiss a § 406(b)(2) claim in another private company ESOP case. The court allowed the claim to proceed based on the allegation that:

> Wilmington Trust acted on behalf of Seller in connection with the Plan's stock and loan transactions in 2012 with Seller by causing the Plan to acquire ISCO stock and a loan. This greatly benefited Seller to the substantial detriment of the Plan, even though Wilmington Trust was required to serve the interests of the Plan in connection with any such transaction.

Swain, 2018 WL 934598, at *6. Following *Swain* and based on similar allegations, the Southern District of Mississippi also denied a motion to dismiss a § 406(b)(2) claim in a case involving these same two law firms. *See Blackwell v. Bankers Tr. Co. of S.D.*, No. 3:18-CV-141, 2019 WL 1433769, at *4-5 (S.D. Miss. Mar. 29, 2019). In the instant case, Plaintiffs made a comparable allegation in the Complaint. (Compl. ¶ 87). Further, while the Trustee quotes Complaint allegations that it was Trustee to the Plan and thus had a duty to act on behalf of the Plan and its participants, that does not mean it actually did so; that breach is what this claim is all about. And the argument that the 2017 Form 5500 proves the § 408(e) defense is nonsense for the reasons stated above. The Court should therefore deny the motion to dismiss this claim.

5. The ERISA § 406(b)(3) Claim.

Plaintiffs' ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3),[15] claim alleges the Trustee's receipt of consideration from World Travel in the ESOP Transaction, in the form of fees and an indemnification agreement potentially worth millions of dollars, was a prohibited transaction. (Compl. ¶¶ 54, 76, 79, 86, 88). While the Trustee does not deny that World Travel paid its fee or provided it with a valuable indemnification agreement, it urges the § 406(b)(3) claim should be dismissed because the Complaint did not negate the § 408(b)(2) defense by providing "factual allegations about PFS's compensation, let alone that it was unreasonable." (Def. Br. at 19). But, again, Plaintiffs have no burden to negate an affirmative defense. Further, the Trustee has not shown that the amount of its fee is publicly known, which it is not, nor does it acknowledge that part of the consideration it is alleged to have received is a valuable indemnification agreement. And most importantly, that defense is *not* available on a § 406(b) claim. *See Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 93–96 (3d Cir. 2012); *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan*, 751 F.3d 740, 750-51 (6th Cir. 2014).

The Trustee's argument that it is not subject to liability because it was not a fiduciary when negotiating compensation is a red herring. This is a prohibited transaction claim, not a breach of fiduciary duty claim. Therefore, the Trustee's statutory violation was not in the negotiation but rather its receipt of the prohibited consideration, and there can be no dispute that the Trustee was a fiduciary when it was paid its fee after having completed the ESOP

[15] This rule provides: "A fiduciary with respect to a plan shall not— . . . (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(3).

Transaction. *See Lysengen v. Argent Tr. Co.*, 498 F. Supp. 3d 1011, 1022 (C.D. Ill. 2020) (ESOP trustee's status as non-fiduciary in negotiations did not defeat claim for receipt of payment prohibited by § 406(b)(3)). Further, the Trustee ignores that the most valuable consideration it received is an indemnification agreement potentially worth millions of dollars. This is not a typical scenario where a plan service provider negotiates a fee in an arm's length transaction with the person who will pay the fee. Here, the service provider agreed to consideration with the sponsor's selling shareholders, and the indemnification part of the consideration would only be paid later by the company when it was owned by an ESOP to which the service provider owed fiduciary duties. The courts recognize that ESOP participants may be harmed by such indemnifications. *See Pfeifer v. Wawa, Inc.*, 214 F. Supp. 3d 366, 373 (E.D. Pa. 2016); *Delta Star, Inc. v. Patton*, 76 F. Supp. 2d 617, 640–41 (W.D. Pa. 1999).

B. <u>The Motion to Dismiss Count II Should be Denied Because the Complaint Meets Rule 8 and did Not Need to Meet Rule 9(b).</u>

1. <u>Count II does Not Allege Fraud and Need Not be Pled Under Rule 9(b).</u>

The Trustee argues Plaintiffs allege a fraud but fail to plead it with particularity. Def. Br. at 21-24. The argument depends on gross distortions of Plaintiffs' allegations. Plaintiffs simply allege Parades acted in self-interest and caused the Plan to pay more than fair market value and the Selling Shareholders supplied unreasonably optimistic financial projections. These are standard fiduciary breach allegations. Plaintiffs do not allege fraud. The only fraud here is the Trustee's argument.[16]

As a threshold matter, Plaintiffs are not required to plead breach of fiduciary duty claims with particularity. *See Harzewski v. Guidant Corp.*, 489 F.3d 799, 805 (7th Cir. 2007); *Concha v.*

[16] Plaintiffs do not address the Trustee's arguments that Plaintiffs have failed to plead fraud with particularity because Plaintiffs do not allege a fraud at all. Nor do they dispute that had they alleged fraud in connection with breaches of duty, they would need to plead the fraud with particularity.

London, 62 F.3d 1493, 1502 (9th Cir. 1995); *Spear v. Fenkell*, No. 13–02391, 2015 WL 3643571, at *20 (E.D. Pa. June 12, 2015) ("There is no heightened pleading requirement for ERISA breach of fiduciary duty claims."); *In re Fruehauf Trailer Corp.*, 250 B.R. 168, 206 (D. Del. 2000). Thus, the Trustee must invent allegations of fraud to invoke Rule 9(b)'s pleading standard.

Compare the Trustee's paraphrasing of the Complaint to what it actually says:

> According to the FAC, the Parades Defendants supposedly agreed to "act in favor of the" sellers for their own pecuniary gain: *first*, the Parades Defendants purportedly wanted the company to hire them as the ESOP's post-Transaction trustee, and, *second*, the Parades Defendants allegedly needed "sellers of [other] companies" to learn that the Paredes Defendants "applied a lesser degree of due diligence in ESOP purchases" than others, which would earn them the "possibility of business" from those other sellers.

Def. Br. at 21, quoting Complaint ¶ 73.

In contrast to the selective excerpts above, the Complaint says:

> Incentives to the Trustee to act in favor of the Selling Shareholders in the ESOP Transaction in breach of its duty of loyalty to the Plan included the possibility of business from sellers of companies who understood that the Trustee applied a lesser degree of due diligence in ESOP purchases of businesses than is typical for non-ESOP-buyers' purchases of business, and engagement as the Plan's ongoing trustee after the ESOP Transaction and the fees paid for that engagement.

Compl. ¶ 73. Nowhere do Plaintiffs allege an agreement between the Trustee and the Selling Shareholders for the benefit of the Selling Shareholders. Rather, Plaintiffs simply allege the Trustee had self-interested business motivations. *Cf. Brundle*, 919 F.3d at 779 (affirming findings that ESOP trustee's failure of diligence may have been motivated by "extensive and lucrative business relationships"). These allegations go a breach of the duty of loyalty, not to fraud; they go to "misfeasance," not "malfeasance." *Harzewski*, 489 F.3d at 805 (contrasting ERISA claims about self-dealing and conflicts with fraud claims); *see also Rudd v. Branch Banking & Tr. Co.*, No. 13-02016, 2014 WL 12607795, at *16 (N.D. Ala. Nov. 14, 2014) (allegations of conflicts and self-dealing by fiduciary are governed by Rule 8); *Hill v. BellSouth Corp.*, 313 F. Supp. 2d 1361, 1366 n.4 (N.D. Ga. 2004) (allegations that certain incentives caused conflicts of interest did not require Rule 9(b) pleading), *abrogated on other grounds*, *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014).[17]

Next, the Trustee claims Plaintiffs allege "fraudulent accounting" in Paragraph 68 of the Complaint. Def. Br. at 23. Not so. The allegations speak for themselves:

> According to CW1, World Travel had revenue-sharing agreements with a number of its clients, by which World Travel was to refund some of the commissions its travel partners provided it for earned bookings. According to CW1, Jim Wells was fully aware of and controlled how World Travel accrued liabilities resulting from these revenue-sharing agreements and Jim Wells instructed that World Travel employees should not follow up on amounts due to clients unless the client brought it up.

Compl. ¶ 68. Moreover, this allegation does not go to the conduct of the Trustee but to the Wells Defendants, in particular Jim Wells (and the Wells Defendants do not make a serious argument on this issue, relegating it to a hypothetical in a footnote, Dkt. 45-1 at 11 n.2). Nowhere do Plaintiffs claim the Trustee knew of it and went along. This allegation has nothing to do with Count II of the Complaint against the Trustee.

Finally, the Trustee argues that allegations about a discount for lack of control and control premium (Def. Br. at 23, citing Compl. ¶ 67), and allegations about various other valuation failures (Def. Br. at 23, citing Compl. ¶ 72), are insufficiently particular under Rule 9(b). Maybe so, but that is irrelevant because Plaintiffs do not allege a fraud. Rather, these allegations are about common valuation errors.

In sum, the only allegations supposedly sounding in fraud identified by the Trustee simply allege it had motives and incentives to act in self-interest in the Transaction and made

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[17] Plaintiffs agree with the proposition, at pages 23-24 of the Motion, that generalized incentives and motives to profit do not sound in fraud.

several valuation errors. That's it.

The authorities cited by the Trustee on this issue consist largely of cases stating general and uncontroversial pleading rules. One decision, however, bears discussion: *Vigeant v. Meek*, 953 F.3d 1022 (8th Cir. 2020). The decision underscores the difference between fraud allegations and the breach of fiduciary duty allegations that the Seventh Circuit explained in *Harzewski*, 489 F.3d at 805 (contrasting ERISA claims about self-dealing and conflicts with securities fraud claims). In *Vigeant*, the plaintiffs alleged that company officers "inflated the value" of company stock by repeatedly reporting single sales as multiple sales where sales were one of the primary financial metrics. 953 F.3d at 1026. The plaintiffs also alleged the company sent multiple, superfluous employees to engagements to book travel expenses so that it would look like the company had more sales. *Id.* Far from deciding whether these allegations sounded in fraud, the Eighth Circuit said "we need not decide" that issue. *Id.* at 1027. Further, the court explained the Secretary of Labor misread the district court decision as holding Rule 9(b) "applies to all allegations that a fiduciary provided 'inaccurate and misleading information' to an appraiser." *Id.* In other words, the district court did not hold and the Eighth Circuit did not affirm that allegations that a person supplying inaccurate or misleading information to an appraiser in connection with an ESOP transaction require Rule 9(b) pleading standards. The only 9(b) holding by the district court was that allegations about "fraudulent data manipulation" triggered Rule 9(b) requirements, a holding on which the Eighth Circuit did not rule. *Id.*

2. Count II Meets Rule 8's Pleading Standard.

Rule 8 requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Trustee wrongly argues the Count II breach of fiduciary duty claim should be dismissed under Rule 8 because Plaintiffs do not plead non-public information about the ESOP Transaction known only to insiders like Defendants, and not by average World Travel employees like Plaintiffs. (Def. Br. at 19-21). But as demonstrated in Part III, *supra*, the Federal Rules of Civil Procedure do not impose an impossible standard under which a plaintiff must plead facts that she does not and cannot know. To the contrary, the courts hold uniformly that consideration must be given to plan participants' lack of access to plan insider information, and that allegations in the nature of "on information and belief" are allowed where facts are peculiarly within the possession and control of the defendants. *See* Part III, *supra*. Here, Plaintiffs cannot plead additional facts about the Trustee's investigation into the value of World Travel stock or business information related to the company's value because that is non-public confidential information. *See Allen*, 835 F.3d at 677 (explaining "information about . . . how a stock was valued [is] confidential financial information" not likely to be turned over "without the protections of the discovery process"). The Trustee's demand for more is thus not well taken.[18] The Complaint alleges many facts, from both public sources and a confidential witness, upon which the Court may infer that the Trustee's investigation was inadequate, it did not act solely in the interests of the Plan and its participants, and it breached its duty by approving the Plan's purchase of stock for more than fair market value. (Compl. ¶¶ 7, 40, 52, 60–73, 87, 98). The Complaint meets the Rule 8 pleading standard and the Trustee's motion should be denied.

The Trustee shoehorns a duty of loyalty argument into a footnote near the end. (Def. Br. at 24 n.15). It has no merit. Count II alleges breach of fiduciary duty under § 404(a), including

[18] The Trustee's authorities do not support its argument. In *Pension Ben. Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, the plaintiff was the plan administrator, which had access to insider information on which to plead. 712 F.3d 705, 709 (2d Cir. 2013). The Second Circuit recognized that participant claims in contrast will not have such inside information. *Id.* at 718. *Sweda* is distinguishable as discussed above, and did not impose an impossible requirement to plead based on inaccessible insider information. The Trustee's argument that Count II is barred because the Plan "got a deal" (Def. Br. at 20) under *Lee v. Argent* and the 2017 Form 5500 is meritless for the reasons stated above.

the duties of loyalty (or exclusive purpose), care, skill, prudence and diligence. (Compl. ¶¶ 94, 95, 98, 99). Saying nothing about care, skill, and diligence, the Trustee improperly attempts to peel off Plaintiffs' loyalty claim from their prudence claim, arguing allegations of its inadequate investigation cannot support both prudence and loyalty claims. But 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*, 100 F.3d at 1488 (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 Bruister*, 823 F.3d at 260-61 (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,* 919 F.3d at 779 (business relationships between firms on opposing sides of transaction may have motivated trustee's poor performance). The Trustee does not cite any private company ESOP case supporting dismissal. And as noted above, the Complaint *does* allege disloyalty, that is, the Trustee's failure to act solely in the interests of the Plan and its participants.

Further, it would make no sense to dismiss Count II when the issues in Count II are the same as on the Trustee's § 408(e) defense in Count I. Dismissal of Count II would result in no economy in discovery, as Plaintiffs will seek the same discovery for the breach of fiduciary duty claim for which they have the burden of proof as they will to rebut the Count I affirmative defense for which the Trustee has the burden. *See Fish v. GreatBanc Tr. Co.*, 749 F.3d 671, 680 (7th Cir. 2014) ("In reviewing the acts of ESOP fiduciaries under the objective prudent person standard, courts examine both the process used by the fiduciaries to reach their decision as well as an evaluation of the merits. This is true when determining whether an act was prudent under the general standard of [29 U.S.C.] § 1104 and whether an otherwise prohibited transaction under § 1106 is saved by 'adequate consideration' under § 1108(e).") (citation omitted). Plaintiffs should be allowed to prove Count II on that necessary discovery.

C. Defendant PFS Should Not be Dismissed.

The Complaint alleges PFS's status as Plan trustee and fiduciary. (Compl. ¶¶ 1, 16–21). While the Trustee argues (Def. Br. at 25) that two pages from an incomplete engagement agreement it submitted with its motion (Ex. 2, Dkt. 46-4) disprove the allegation, they do *not*, and moreover they cannot be considered on this motion under the Trustee's own authorities. The Court should therefore decline the motion to dismiss PFS for lack of trustee or fiduciary status.

The Trustee's authority (Def. Br. at 10 n.8) of *Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997), held that "a 'document *integral to or explicitly relied upon in the complaint*' may be considered" on a motion to dismiss because "the primary problem" of "lack of notice to the plaintiff —is dissipated '[w]here plaintiff has actual notice ... and has relied upon these documents in framing the complaint." *Id.* at 1426 (citations omitted). But Plaintiffs do not have such notice because they do not have the engagement agreement, as reflected in Complaint ¶ 77 where Plaintiffs state discovery is needed for them to have evidentiary support for the terms of the indemnification they believe to be in the engagement agreement.

Burlington also precludes consideration of the Trustee's Exhibit 2 because only "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss" may be considered. 114 F.3d at 1426 (citation omitted). The document submitted is not authenticated because it is incomplete and, further, cannot be considered because the incomplete submission is prejudicial to Plaintiffs. *See Heneghan v. Northampton Cmty. Coll.*, Civ. No. 09-04979, 2010 WL 2730638, at *3 (E.D. Pa. July 8, 2010) (rejecting incomplete agreement attached to motion to dismiss); *GGC Assocs., LLC v. Hamner*, No. 3:17cv402, 2017 WL 4295198, at *3 (E.D. Va. Sept. 27, 2017) (not considering incomplete document attached to motion to dismiss because questioned authenticity); *cf. Chevron U.S.A., Inc. v. M & M Petroleum Servs., Inc.*, SACV 07-0818, 2009 WL 2431926, at *22 (C.D. Cal. Aug. 6, 2009) (defendant's production of incomplete copies caused undue prejudice to plaintiff).

Even if the Court were to consider the incomplete agreement, it does not disprove PFS's alleged status. The contract is on PFS letterhead and it confirms PFS is Paredes's "operating company." Ex. 2 at 1. The incomplete contract doesn't clearly define PFS's role, for example not stating whether Paredes was assisted by other PFS personnel, or used its offices, insurance, etc. And it is known that a PFS vice president succeeded Paredes in 2020, suggesting PFS was Trustee and a functional fiduciary. (Compl. ¶ 19). Exhibit 2 simply does not rebut the Complaint's allegations, which must be taken as true at this juncture.

V. CONCLUSION

For the foregoing reasons, the 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,

/s/ Patricia Mulvoy Kipnis

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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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